THE BLACKLISTING EXECUTIVE ORDER: REWRITING FEDERAL LABOR POLICIES THROUGH EXECUTIVE FIAT

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

AND THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, FEBRUARY 26, 2015

Serial No. 114–3

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web: *www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education*
or
Committee address: *http://edworkforce.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE
93–544 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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THE BLACKLISTING EXECUTIVE ORDER: REWRITING FEDERAL LABOR POLICIES THROUGH EXECUTIVE FIAT

Thursday, February 26, 2015
House of Representatives
Subcommittee on Workforce Protections
joint with
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
Washington, D.C.

The subcommittees met, pursuant to call, at 10:07 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [Chairman of the Workforce Protections subcommittee] presiding.

Present from the Subcommittee on Workforce Protections: Representatives Walberg, Thompson, Brat, Bishop, Russell, Wilson, Pocan, and Clark.

Present from the Subcommittee on Health, Employment, Labor, and Pensions: Foxx, Walberg, Byrne, Allen, Polis, Courtney, Pocan, Wilson, Bonamici, Takano, and Scott.

Also present: Representatives Kline, Grijalva, and Ellison.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Christie Herman, Professional Staff Member; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; Zachary McHenry, Legislative Assistant; Daniel Murner, Deputy Press Secretary; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Alexa Turner, Legislative Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Barbera Austin, Minority Staff Assistant; Amy Cocuzza, Minority Labor Detailee; Denise Forte, Minority Staff Director; Melissa Greenberg, Minority Labor Policy Associate; Carolyn Hughes, Minority Senior Labor Policy Advisor; Eunice Ikene, Minority Labor Policy Associate; Brian Kennedy, Minority General Counsel; Brian Levin, Minority Press Secretary; Richard Miller, Minority Senior Labor Policy Advisor; Amy Peake, Minority Labor Policy Advisor; Veronique Pluviose, Minority Civil Rights Counsel; and Rayna Reid, Minority Labor Policy Counsel.

Chairman WALBERG. The subcommittee will come to order. Today, we will have opening statements from the chairmen and the ranking members of the two subcommittees.

With that, I recognize myself for my opening statement.

Good morning, and I would like to welcome our guests and thank our witnesses for joining us.

I would also like to welcome our colleagues from the Health, Employment, Labor, and Pensions Subcommittee. Given the breadth of the issues we will discuss this morning, we felt it was appropriate to hold a joint hearing.

Federal contractors are essential to government operations. Most employers provide quality, cost-effective services while complying with labor and employment law.

Unfortunately, there are a few bad actors. We can all agree bad actors who deny workers basic protections, including wage and overtime protections, should not be awarded federal contracts funded with taxpayer dollars.

For that reason, the federal government has had a system in place for decades which, if used effectively, would deny federal contracts to bad actors. In the event that a contractor fails to maintain a satisfactory record of integrity and business ethics, the contracting agency can suspend or debar the contractor, disqualifying the employer from contracts government-wide.

Rather than dealing with these contractors directly under an existing system, on July 31, 2014 President Obama signed an executive order adding a burdensome, redundant, and unnecessarily punitive layer onto the federal procurement system.

The executive order will require employers to report instances in which they or their subcontractors have violated or allegedly violated various federal labor laws and equivalent state laws for a preceding three year period. Prior to awarding a contract, these agencies' contracting officer and a newly created labor compliance advisor will review this information and decide whether the employer's actions demonstrate a lack of integrity or business ethics.

While the new reporting requirements are significantly burdensome, particularly for some small employers, the subjectivity of the decision-making process and deprivation of due process are deeply troubling.

The labor compliance advisor will advise the contracting officer as to whether an employer's record amounts to a lack of business integrity. However, this subjective determination will include alleged violations, creating a new, dangerous precedent that employers are guilty until proven innocent.

Ultimately, the employer could be blacklisted based on alleged violations that are later found to have no merit, putting some good employers on the brink of going out of business and impacting their workforce.

We all share the same goal however, rather than implement another layer of bureaucracy, the administration should work with Congress and stakeholders to use the existing system to crack down on bad actors and ensure the rights of America's workers are protected.

With that, I now yield to my distinguished colleague from Florida, Congresswoman Wilson, the ranking member on Workforce Protections Subcommittee, for opening remarks.

And welcome.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Federal contractors are essential to government operations. Most employers provide quality, cost effective services while complying with labor and employment law. Unfortunately, there are a few bad actors. We can all agree bad actors who deny workers basic protections, including wage and overtime protections, should not be awarded federal contracts funded with taxpayer dollars.

For that very reason, the federal government has had a system in place for decades which, if used effectively, would deny federal contracts to bad actors. In the event that a contractor fails to maintain a satisfactory record of integrity and business ethics, the contracting agency can suspend or debar the contractor, disqualifying the employer from contracts government wide.

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However, this subjective determination will include alleged violations, creating a new, dangerous precedent that employers are guilty until proven innocent. Ultimately, the employer could be blacklisted based on alleged violations that are later found to have no merit, putting some good employers on the brink of going out of business.

We all share the same goal, however, rather than implement another layer of bureaucracy, the administration should work with Congress and stakeholders to use the existing system to crack down on bad actors and ensure the rights of America's workers are protected.

With that, I will now the ranking member of the subcommittee, Representative Wilson, for her opening remarks.

Ms. WILSON of Florida. Thank you, Mr. Chair.

Mr. Chairman, today is our first Workforce Protection Subcommittee hearing of the 114th Congress, and I can barely talk. I look forward to working with you and our colleagues to address the needs of America's working class, which is the backbone of our country.

Today we are discussing the President's executive order on fair pay and safe workplaces, aimed at improving the federal contracting process by ensuring that government agencies have access to data and can evaluate each bidder's compliance history with 14 basic workplace laws. Simply put, this executive order builds on the expectation that companies who are seeking federal contracts must obey federal laws.

Annually, the U.S. government issues approximately $500 billion in contracts—that is with a "b." According to two recent reports, one-third of those companies who received the largest sanctions for

violations of federal wage and health and safety laws went on to receive a government contract.

I am certain that we can all agree that taxpayer dollars should not be used to award contracts to unscrupulous companies that have a pervasive practice of engaging in wage theft, cheating workers out of overtime, or putting workers' safety in jeopardy.

In the audience today we have Ms. Karla Quezada, a food court worker at the Reagan Building, which is owned by the U.S. General Services Administration and home to several federal agencies. Despite regularly working more than 40 hours a week, Karla never received a dime in overtime pay.

And she reported to the Department of Labor that her employer used a fraudulent scheme to cover up the wage theft. Although she is still working there, her hours have been more than halved.

Karla was named a "champion of change" by the President for her advocacy to raise the minimum wage for government contract workers to $10.10 per hour.

Karla, thank you so much for being here today and for your courage.

[Applause.]

Ms. WILSON of Florida. Finally, Mr. Chairman, we have received written testimony supporting this executive order from the Campaign for Quality Construction, comprised of the FCA International; the International Council of Employers of Bricklayers and Allied Craftworkers; the Mechanical Contractors Association of America; the National Electrical Contractors Association; the Sheet Metal and Air Conditioning Contractors' National Association; and the Association of Union Constructors.

It is their view that this executive order will help ensure that responsible contractors are not put at an unfair disadvantage by those who cut corners and treat violations of labor law as the cost of doing business.

I thank the witnesses for being here today and I look forward to their testimony.

I now yield to the ranking member on the Health Subcommittee, the gentleman from Colorado—

[The statement of Ms. Wilson follows:]

Committee on Education and the Workforce Democrats

Press Office: 202-226-0853
Thursday, February 26, 2015

Rep. Frederica Wilson's (D-OH) Opening Remarks for the Workforce Protections and Health, Employment, Labor and Pensions Joint Subcommittee Hearing, *"The Blacklisting Executive Order: Rewriting Federal Labor Law"*

***

Mr. Chairman, today is our first Workforce Protections subcommittee hearing of the 114th Congress. I look forward to working with you and our colleagues to address the needs of America's working class—the backbone of our country.

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In the audience today we have Ms. Karla Quezada, a food court worker at the Reagan Building, which is owned by the U.S. General Services Administration and home to several federal agencies. Despite regularly working more than 40 hours a week, Karla never received a dime in overtime pay, and she reported to the Department of Labor that her employer used a fraudulent scheme to cover-up the wage theft.

Although she is still working there, her hours have been more than halved. Karla was named a Champion of Change by the President for her advocacy to raise the minimum wage for government contract workers to $10.10 per hour. ***Karla, thank you for being here and for your courage.***

Finally, Mr. Chairman, we have received written testimony supporting this Executive Order from the Campaign for Quality Construction, comprised of the FCA International, the International Council of Employers of Bricklayers and Allied Craftworkers, the Mechanical Contractors Association of America, the National Electrical Contractors Association, the Sheet Metal and Air Conditioning Contractors' National Association, and The Association of Union Constructors. It is their view that this Executive Order will help ensure that responsible contractors are not put at an unfair disadvantage by those who cut corners and treat violations of labor laws as the cost of doing business.

I thank the witnesses for being here today, and look forward to their testimony.

I now yield to the Ranking Member on the HELP Subcommittee, the gentleman from Colorado, Mr. Polis for his opening remarks.

Chairman WALBERG. I thank the gentlelady.

Ms. WILSON of Florida. Okay.

Chairman WALBERG. At this time I will now yield to my distinguished colleague from Alabama, Congressman Byrne, for his opening remarks.

Mr. BYRNE. Thank you, Mr. Chairman.

As a journeyman labor and employment attorney, I have grave concerns over the executive order we are examining today. It unfairly shifts the regulatory burden to employers while removing the burden of proof from labor violation claims. It reverses the historic Anglo-Saxon notion that you are innocent until you are proven guilty—which results, by the way, in a much less efficient system of government acquisition for the taxpayers of the United States.

Furthermore, the executive order's ban on pre-dispute arbitration is a direct violation of the *Federal Arbitration Act*, which ensures the validity and enforcement of arbitration agreements, a practice that the United States Supreme Court has repeatedly reaffirmed. The President has exceeded his authority to make such a change and is in direct violation of that law.

What is worse, through its new reporting requirements the executive order shifts an incredible regulatory burden to contractors themselves by requiring prime contractors, some of whom have thousands of subcontractors, to collect information on their subcontractors related to 14 different federal labor and employment laws and over 500 different state laws.

This will have a major effect on these subcontractors, many of them small businesses with limited resources to handle such an undertaking. Many will be forced to divert resources to handle this new administrative task that will not have to be completed just once, but every six months.

These aggressive new regulations are going to unreasonably block responsible parties from participating in federal government contracts while seriously affecting the willingness of new employers to even seek federal contracts in the first place. The result of this new process will be a significantly delayed contracting process that limits both healthy competition and the efficient delivery of goods to the U.S. government at a reasonable price to the taxpayers.

Instead of helping employers comply with complicated regulatory requirements, the administration has added yet more red tape to the federal procurement system that has the potential of blacklisting responsible employers when there is already a system in place for weeding out truly bad actors.

To make matters worse, contracts will be put in jeopardy by alleged violations—not confirmed or convicted violations, alleged violations. This could be particularly devastating for employers that are the target of union corporate campaigns or competitors who simply want a competitive edge against their competition. This highly elevates the risk of frivolous complaints and the loss of business.

This executive order represents an overstep of authority by the President at the expense of employers and workers and the taxpayers.

Rather than impose additional layers of bureaucracy, the administration would be better served working with Congress and stake-

holders to ensure the rules and regulations implementing our laws are modernized and streamlined. Then, the administration can work with good employers to ensure compliance rather than punishing them after the damage is done.

Prepared Statement of Byrne, Hon. Bradley, a Representative in Congress from the State of Alabama

The vast majority of federal contractors are responsible employers who obey the law and do right by their employees.

There will always be, as the Chairman noted, bad actors who deny workers basic protections and we can all agree they should not receive taxpayer dollars for work on federal contracts.

However, even the most responsible employer can occasionally run afoul of labor and employment laws, or simply be accused of doing so.

The Executive Order we're examining today unfairly shifts the regulatory burden to employers while removing the burden of proof from labor violation claims, resulting in a much less efficient system of government acquisition for both taxpayers and those seeking government contracts.

Furthermore, the Executive Order's ban on pre-dispute arbitration clauses is a direct violation of the Federal Arbitration Act, which ensures the validity and enforcement of arbitration agreements - a practice that the United States Supreme Court has repeatedly reaffirmed.

The President has exceeded his authority to make such a change and is in direct violation of the law.

What's worse – through its new reporting requirements, this Executive Order shifts an incredible regulatory burden to contractors themselves by requiring prime contractors, some of which have thousands of subcontractors, to collect information on their subcontractors related to 14 different federal labor and employment laws and over 500 different state laws.

For example, the Fair Labor Standards Act is the cornerstone of worker wage and hour protection. However, the regulations implementing that law are flawed and outdated.

Even the Department of Labor, which enforces the Fair Labor Standards Act, has run afoul of the law's requirements from time to time.

This will have a major effect on these sub-contractors, many of them small businesses with limited resources to handle such an undertaking.

Many will be forced to divert resources to handle this new administrative task that will not have to be completed just once, but every six months.

These aggressive new regulations are going to unreasonably block responsible parties from participating in federal government contracts while seriously affecting the willingness of new employers to even seek federal contracts in the first place.

The result of this new process will be a significantly delayed contracting process that limits both healthy competition and the efficient delivery of goods to the U.S. government at a reasonable price to taxpayers.

Instead of helping employers comply with complicated regulatory requirements, the administration has added yet more red tape to the federal procurement system that has the potential of blacklisting responsible employers when there is already a system in place for weeding out truly bad actors.

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This highly elevates the risk of frivolous complaints and the loss of business.

This executive order represents an overstep of authority by the President at the expense of employers and workers.

Rather than impose additional layers of bureaucracy the administration would be better served working with Congress and stakeholders to ensure the rules and regulations implementing our laws are modernized and streamlined.

Then the administration can work with good employers to ensure compliance rather than punishing them after the damage is done.

I thank you, Mr. Chairman, and I yield back.

Chairman WALBERG. I thank the gentleman.

And I will take a point of personal privilege here to make mention to the two subcommittees that Chairman Roe, who would normally be sitting in the spot where Mr. Byrne is filling today as vice chairman, has been home for an extended period of time with his wife, who is going through some extremely challenging health situations. And so we wish our colleague and friend the best, and I would ask us all to keep Phil and Pam in prayer at this time.

Having said that, now I yield to my distinguished colleague from Colorado, Congressman Polis, the ranking member on the Health, Employment, Labor, and Pensions Subcommittee, for his opening remarks.

Mr. POLIS. Thank you, Mr. Chairman.

This is a joint subcommittee hearing. I appreciate the opportunity of the HELP Subcommittee to ask questions and provide input on this important issue of how we can better serve taxpayers and improve the efficiency of federal contracting.

I was pleased to see in the Chairman's opening remarks he stated that bad actors should not be awarded contracts and that we should deny federal contracts to bad actors. That is really what this rule and hearing are about here today, how we can better reach that goal.

Frankly, if that were the case, we wouldn't need to be here, we wouldn't need to be discussing the rule.

Unfortunately, there is a pervasive problem among federal contractors. A recent GAO report showed—investigating—that looked at 15 contractors, showed that the federal government awarded these 15 contractors over $6 billion in government contract obligations in one year alone. Clearly there is a problem that requires additional steps to address with regard to the following of our labor laws of our federal contractors.

The President is doing his job in this regard. He is charged in U.S. Code—40 USC 121—with, "The President may prescribe policies and directives that the President considers necessary to carry out this subtitle," referring to federal contracts.

And he is simply taking a step that will, as the Campaign for Quality Construction put it, which is a group of contractors who strongly support this rule, believe that this hearing should be entitled and that this rule will serve the taxpayers well with improved federal contract economy, efficiency, and performance with more discerning and uniform federal prime contractor and subcontractor selection procedures.

I hope that these rules are enough—the proposed rules are enough to address this pervasive problem.

To put a human face on the problem, we have an individual with us today who has been impacted directly by these issues. Edilcia, a single mother of three, who worked at the food court at Ronald Reagan Federal Building for three years.

[Speaking foreign language.]

I met her before this hearing and she is with us here today.

Even though she worked 10 hours a day—

[Speaking foreign language.]

Ten hours a day, seven days a week, she never received a dime of overtime pay.

How could that happen? She has filed for over $30,000 in back wages and damages because what her employer did is they forced her to clock in and out of two different businesses within the Reagan Building, both owned by the same person.

Is this the kind of behavior of a federal contractor that we want to reward with more contracts? Or, is this the type of behavior that we want to make sure that contractors rectify and what happened to Edilcia does not happen to other employees?

So even though Edilcia worked in some cases more than 70 hours a week, she didn't receive a dime of overtime. She started to speak up, and when the government shut down in 2013 her employer fired her.

And companies like this need to be put on a remedial path towards acting responsibly, which is what these rules are all about. I have a letter expressing the support of 70 organizations dedicated to eradicating discrimination in the workplace and promoting good jobs, and they agree that this executive order is an important step towards this goal.

Mr. Chairman, I ask permission to submit the letter?

[The information follows:]

February 23, 2015

The Honorable John Paul Kline Jr.
U.S. House of Representatives
2439 Rayburn House Office Building
Washington, DC 20515-2302

The Honorable Bobby Scott
U.S. House of Representatives
1201 Longworth House Office Building
Washington, DC 20515-2302

Dear Chairman Kline and Ranking Member Scott:
On behalf of the undersigned organizations, we write to express our support for the Fair Pay and Safe Workplaces Executive Order. We are organizations dedicated to eradicating all forms of discrimination in the workplace and promoting good jobs for women. This executive order is the latest in a series of important steps the President has taken to bring the federal contractor community closer to achieving these goals. We strongly urge you to defend against any efforts to undercut this executive order through the legislative process.

Employers that have the privilege of doing business with the federal government also have a responsibility to abide by the law. This executive order is crucial to the communities we represent because it helps ensure that federal contractors behave responsibly and ethically with respect to labor standards, civil rights laws and more. The executive order will ensure that companies applying for federal contracts have every incentive to comply with federal labor and employment laws, including for example the Fair Labor Standards Act (which includes the Equal Pay Act), Title VII, and the Occupational Safety and Health Act, and their state law equivalents. This will lead to fairer treatment for workers in the federal contractor workforce and raise awareness among other employers about their legal obligations. The executive order will also ban compulsory arbitration of claims of sexual harassment and sexual assault, which is critical to ensuring that workers can have their day in court.

The government has long held on both moral and economic grounds that contracting should not be merely a way to acquire goods and services cheaply, but should also allow government to establish itself as a model for the private sector. For example, Executive Order 11246, signed by President Johnson in 1965, prohibits employment discrimination by federal contractors and requires that employers with federal contracts take affirmative actions to make equal opportunity employment a reality, which has resulted in the contractor workforce becoming significantly more diverse and has achieved more economical and efficient contracting for the public.

Yet government contractors are among the worst violators of workplace laws, with one study finding that almost 30 percent of the top violators of federal wage and safety laws hold federal contracts. Too many federal contract jobs are low-paying and poor quality, leaving workers especially vulnerable to abusive employment practices. These low-road practices have dire consequences for workers and their families. For example, the Economic Policy Institute estimates that one in five federal contract workers do not earn enough to keep a family of four out of poverty and often do not receive benefits. And many of the workers earning low wages are women.

Promoting federal contractors' compliance with basic labor, employment and civil rights laws is

particularly important in light of the trends in the workforce overall. More than one-third (35 percent) of women's job gains during the economic recovery have been in the ten largest low-wage occupations—those paying $10.10 or less—compared to 18 percent of men's gains in the same occupations. And, two-thirds of workers in low-wage jobs are women. Low-wage workers are especially vulnerable to workplace abuses such as wage theft, discrimination, harassment, last-minute scheduling practices, violation of their rights to family and medical leave, and retaliation for banding together to improve their working conditions.

This executive order will have a direct and positive impact on the lives of America's working families and provide much needed oversight for a vital sector of our economy. The women and men who serve food in our nation's museum cafeterias and clean federal office buildings deserve to be treated fairly and with respect. This executive order will create strong incentives for federal contractors to comply with baseline labor standards under federal laws and their state law equivalents to ensure that federal contract jobs are high-quality and familysustaining. We urge you to vigorously defend against any attacks on this crucial step forward for millions of workers and their families, and we look forward to working with you to help secure its successful implementation.

Sincerely,

9to5, National Association of Working Women
American Association of University Women
American Civil Liberties Union
American Federation of State County and Municipal Employees
American Federation of Teachers
American Psychological Association
Business and Professional Women, St. Pete-Pinellas
Catalyst
Center for Law and Social Policy (CLASP)
Coalition of Labor Union Women
Communications Workers of America
Economic Opportunity Institute
Equal Pay Coalition NYC
Equal Rights Advocates
Family Forward Oregon
Family Values @ Work
Feminist Majority Foundation
Florida Institute for Reform and Empowerment
Institute for Science and Human Values
International Brotherhood of Teamsters
Jewish Alliance for Law & Social Action
Jobs With Justice
Labor Project for Working Families
Legal Aid Society - Employment Law Center
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National Committee on Pay Equity
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National Council of Women's Organizations (NCWO)
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National Domestic Workers Alliance
National Organization for Women
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National Resource Center on Domestic Violence
National Women's Health Network
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New Jersey Citizen Action
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Public Justice Center
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Restaurant Opportunities Centers United
Sargent Shriver National Center on Poverty Law
Social Work Helper
The Solomon Project
Southwest Women's Law Center
TakeAction Minnesota
The Leadership Conference on Civil and Human Rights
The VASHTI African American Women's and Girls Initiative
UltraViolet
Union for Reform Judaism
Voices for Illinois Children
    The Fiscal Policy Center at Voices for Illinois Children
Wider Opportunities for Women
Women AdvaNCe
Women Employed
Women of Reform Judaism
Women Voices Women Vote Action Fund
Women's Law Project

Chairman WALBERG. Without any objection.

Mr. POLIS. Thank you.

I also want to mention another example of a federal contractor, Tyson Foods, that received half a billion dollars in federal contracts in 2012 alone, but they had almost $7.2 million in penalties and assessments for workplace safety violations and back pay for overtime or other violations.

Companies cannot just try to see these costs and fees as a cost of doing business. They need to know that when they violate our labor laws, which we take very seriously as a country, that there are ramifications to their business and to their future potential to be a contractor of the federal government.

I find it interesting that this hearing is also being held solely on speculation since we haven't even seen the regulations and guidance from DOL or OMB. The contractors who are concerned that their record of violations may be problematic aren't even aware of the details of how this will be implemented because it simply hasn't been presented yet.

But it is a really simple concept: If you are consistently breaking the law with regard to your workers, taxpayers, or the community, you should not receive millions of dollars of taxpayer contracts. Companies that are cutting corners on safety, not paying their workers on time, not paying overtime, or in dozens of other areas, shouldn't be allowed to compete against good actors who follow our law.

Everyone needs to start from a level playing field. It is simply not fair if one company is paying people below the minimum wage or withholding salaries from their workers. They don't have an actual economic ability to bid at a lower cost, but because they violate our labor laws they, in fact, might take out the excess profits or bid at a lower cost.

Unfortunately, unscrupulous actors who pervasively ignore the law are allowed to compete with those who follow our labor laws. And right now there are some bad actors receiving billions of dollars in federal contracts. I hope that this rule will address that.

I look forward to the information that our expert witnesses will be providing before us today, and I yield back the balance of my time.

[The statement of Mr. Polis follows:]

Committee on Education and the Workforce Democrats

Press Office: 202-226-0853
Thursday, February 26, 2015

Rep. Jared Polis's (D-CO) Opening Remarks for the Workforce Protections and Health, Employment, Labor and Pensions Joint Subcommittee Hearing, *"The Blacklisting Executive Order: Rewriting Federal Labor Law"*

***

Thank you, Mr. Chairman. Good Morning everyone, I want to thank our witnesses for being here today for this joint subcommittee hearing.

I would like to start with the question of whether the President has the authority to make this rule. Let us look at the US Code regarding federal contracts. This is 40 USC 121 (A): "The President may prescribe policies and directives that the President considers necessary to carry out this subtitle." And that subtitle refers, in part, to federal contracts. So let's just take that off the table right now.

Let's also take off the table the question of whether this issue is pervasive or problematic. A 2010 GAO report emphatically proves there is a problem. GAO investigated 15 federal contractors cited for violating hundreds of federal labor laws enforced by DOL, OSHA, and NLRB. The federal government awarded these 15 federal contractors over $6 billion in government contract obligations during fiscal year 2009 alone.

One individual who has been impacted by this issue sits in the audience today. Edilcia is a single mother of 3 who worked at the food court of the Ronald Reagan Federal Building for 3 years. Even though she worked 10 hours a day 7 days a week, she never received a dime in overtime pay. She has filed for over $30,000 in back wages and damages because her employer would force her to clock in and out at two different businesses within the Reagan building, both of which are owned by the same person.

So even though she worked in some cases more than 70 hours a week, the timesheet wouldn't show that she worked more than 40 hours at any one location. She started to speak up and when the government shut down occurred in 2013, her employer fired her. Companies like these need to be put on a remedial path towards acting responsible.

I also have a letter here expressing the support of about 70 organizations dedicated to eradicating all forms of discrimination in the workplace and promoting good jobs for women. They agree that this executive order is the latest in a series of important steps taken to bring the federal contractor community closer to achieving those goals.

As an example of one of these bad actors we can look at Tyson Foods. They received $555.5 million in Federal Contracts in 2012 alone. Tyson foods had almost $7.2 million in penalties and assessments for workplace safety violations and back-pay for overtime or other violations. 2

Next, I would like to address the issue of the confusing title and timing of this hearing. The Majority calls this the Blacklisting Executive Order, but the Campaign for Quality Construction- a group of contractors who believe this rule will make the workplace better- said – "blacklisting" is pejorative. CQC suggests the following title as a better description: *"Serving the taxpayers well with improved Federal contract economy, efficiency, and performance with more discerning and uniform Federal prime contractor and subcontractor selection procedures."*

They go on to state that they believe the EO is an important step because it "provides more complete and uniform prime contractor and subcontractor protections in the responsibility determination process than are currently available under current Federal Acquisition Regulation (FAR) screening procedures. Employers – primes and subs have more rights, remedies and redress for non-responsibility determinations under the EO than the current FAR procedures allow."

I also find it interesting that this hearing is being held by the Majority based solely on speculation since we have not even seen the regulations and guidance from DOL & OMB. The contractors who are concerned that their record of violations may be problematic are not even aware of many of the details of how this will be implemented, because none of us know.

However, it really is a simple concept. If you are consistently breaking the law without regard for your workers, taxpayers or the community, you should not receive millions of taxpayer dollars. Companies that are cutting corners in safety, fair pay and in dozens of other areas shouldn't get to compete against good actors. Everyone must start from a level playing field. Now, to be clear, there are really only a few bad actors, and the vast majority of companies will not have any issues with this Executive Order. But unscrupulous actors who pervasively ignore the law and cut corners again and again should not be awarded. And right now some bad actors are receiving billions in federal contracts without adequate scrutiny.

Chairman WALBERG. I thank the gentleman.

Pursuant to committee rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous materials referenced during the hearing to be submitted in the official hearing record.

At this time, let me also enter, if there is no objection, two letters—one coming from a group of employers who are concerned with fair pay and safe workplaces and the executive order—to be submitted to the record; as well as a letter from the Associated Builders and Contractors on their concerns, as well.

[The information follows:]

November 6, 2014

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Ms. Cecilia Muñoz
Assistant to the President and
Director of the Domestic Policy Council
Executive Office of the President
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Re: Concerns with the Fair Pay and Safe Workplaces Executive Order (E.O. 13673)

Dear Secretary Perez and Ms. Muñoz,

The undersigned organizations represent a broad cross-section of the federal contractor community. We are writing to follow up on the views expressed at the October 10, 2014 White House listening session regarding the President's "Fair Pay and Safe Workplaces" Executive Order (E.O.) 13673. Our organizations appreciate your outreach to the contractor community and are encouraged by your commitment to pursuing a transparent and full rulemaking process. However, our members have strong concerns with this E.O. and believe it suffers from a number of fundamental flaws.

First and foremost, the President does not have the legal authority to make the regulatory changes that will follow from this E.O. By directing the Department of Labor (DOL) to develop guidance that will establish degrees of violations not included in the underlying statutes, the E.O. significantly amends the enforcement mechanisms Congress established for these laws. Simply put, the President is not authorized to change enforcement mechanisms in a statute without specific Congressional approval.

In addition to exceeding statutory authority, the E.O. disregards existing enforcement powers the administration already has through the Federal Acquisition Regulation (FAR) and various labor laws. The DOL and the federal agencies have sufficient authority under the FAR to consider contractor compliance with federal labor laws and share relevant information with federal contracting officers or agency suspension and debarment officials. In the most egregious cases, these authorities include the ability to initiate suspension and debarment proceedings against federal contractors, based upon violations of established business ethics standards, including violations of the laws covered by the E.O. The E.O. will only complicate the current system by imposing new data collection, review, inter-agency consultation and enforcement procedures on top of the already balanced remedial provisions under the 14 labor laws and related state laws the E.O. cites.

Another area where the E.O. contradicts federal law is in the impact it would have on the ability of employers to use arbitration to resolve specific types of employee disputes. For contracts over one million dollars, the E.O. prohibits contractors from relying on pre-dispute arbitration agreements to resolve certain civil rights and tort claims. While the Executive Order tracks language that has been included in Department of Defense appropriations legislation since FY 2010, no act of Congress has applied these limitations to any other set of federal contractors. In addition, federal law and Supreme Court decisions have made it clear that these arbitration agreements are acceptable, except as limited by the DOD appropriations language.

We are also deeply concerned that implementation of the E.O. will create widespread disruptions in the federal procurement process and significantly increase costs for both government and industry. Given its highly subjective enforcement requirements, the E.O. will inevitably lead to delays in award evaluations, limitations on competition, and a greater number of contract award protests. Coupled with the other E.O.s issued this year specifically targeting federal contractors, the recordkeeping and reporting requirements in this E.O. significantly increase the cost and administrative burden of contracting with the federal government. Ultimately, this will result in fewer companies and organizations, especially smaller ones, that are willing or able to compete for federal contracts. These results directly conflict with the administration's stated goals of increasing competition, driving efficiencies and savings, reducing barriers to entry for small and innovative employers, and improving the federal acquisition ecosystem in general.

The E.O. also raises many questions that must be addressed, including the definitions of key terms, as well as the impact the rule will have on the federal contracting process itself. For example, what is meant by "administrative merit determination," "arbitral award," "arbitral decision," "equivalent state laws," and "serious, repeated, willful or pervasive"? Will active or non-final determinations and labor complaints be considered? Is it necessary for there to have been a finding of fault for a violation to count against an employer? If contractors will be disadvantaged before they have exhausted their due process rights, how will the rule treat violations that are ultimately overturned? Is self-reporting limited to cases involving an employer's performance of federal contracts?

Upon issuing the E.O., the President stated that "the vast majority" of federal contractors play by the rules and would likely not be impacted by it. However, in addition to overlooking the significant reporting burden imposed by the E.O., this view fails to recognize that certain federal labor laws such as the Fair Labor Standards Act are extremely complex and can be challenging for employers to implement correctly. The Department of Labor itself and other federal agencies have been found to have violated these laws. Furthermore, the requirements under these laws frequently change, as seen in DOL's current effort to modify the rules governing overtime pay. Our members are concerned that a noticeably risk-averse federal contracting officer community will simply avoid doing business with federal contractors with even minor violations, effectively blacklisting them. Though the E.O. ostensibly targets a small number of companies, the requirements and processes it establishes will likely have a much broader impact.

We appreciate your careful consideration of these concerns. Given these problems, it is clear that the executive order cannot be fixed through rulemaking or agency interpretation and should be withdrawn by the President. However, if the Administration is determined to move forward despite these problems, we urge the Administration to conduct a thorough and comprehensive analysis of the full impact these actions will have on federal procurement, employers, and American workers.

Sincerely,

Aerospace Industries Association
American Coatings Association
American Foundry Society
American Hotel & Lodging Association
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
College and University Professional Association for Human Resources
Forging Industry Association
HR Policy Association
Industrial Fasteners Institute
International Franchise Association
IT Alliance for Public Sector
National Association of Manufacturers
Professional Services Council
Society for Human Resource Management
TechAmerica
The Coalition for Government Procurement
U.S. Chamber of Commerce
WorldatWork

Cc: The Honorable Beth Cobert, Deputy Director for Management, Office of Management and Budget
The Honorable Anne Rung, Administrator, Office of Federal Procurement Policy, Office of Management and Budget
The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget
The Honorable Frank Kendall, Under Secretary of Defense for Acquisition, Technology and Logistics, Department of Defense
The Honorable Lafe Solomon, Senior Labor Compliance Advisor, Department of Labor

February 25, 2015

The Honorable Tim Walberg
Chairman, Subcommittee on Workforce Protections
United States House of Representatives
Washington, D.C. 20515

The Honorable Frederica S. Wilson
Ranking Member, Subcommittee on Workforce Protections
United States House of Representatives
Washington, D.C. 20515

The Honorable Phil Roe
Chairman, Subcommittee on Health, Employment, Labor and Pensions
United States House of Representatives
Washington, D.C. 20515

The Honorable Jared Polis
Ranking Member, Subcommittee on Health, Employment, Labor and Pensions
United States House of Representatives
Washington, D.C. 20515

Dear Chairmen Walberg and Roe and Ranking Members Wilson and Polis:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I am writing in regard to your upcoming joint subcommittee hearing, "The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat." The President's "Fair Pay and Safe Workplaces" Executive Order (E.O.) 13673 is the latest of several heavy handed White House actions circumventing congressional authority and disrupting fair and open competition in federal contracting.

ABC has consistently opposed the E.O. since it was issued on July 31, 2014. While regulations implementing this policy have not yet been issued by the FAR Council, ABC and the business community have been present during a number of preliminary discussions with administration officials about these regulations. It is clear this policy will likely give the Obama administration an opportunity to create what is tantamount to a "blacklist" of federal contractors that would not be permitted to compete for federal work, similar to the controversial proposal offered by the Clinton administration in the 1990s. At best, this E.O. creates a host of unintended problems for federal contracting officers and federal contractors that will seriously disrupt the federal procurement process.

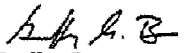
This E.O. is likely to result in the debarment of qualified federal contractors, while entirely circumventing longstanding suspension and department procedures concerning labor and workplace violations that are already part of the federal contracting process. It could prevent numerous Fortune 500 employers and small businesses from entering into or renewing contracts with the federal government—effectively jeopardizing workers whose jobs are tied to their employer's federal contracts.

Federal construction contractors are opposed to the "Fair Pay and Safe Workplaces" E.O. because it is a job killer, it will increase costs to taxpayers by reducing competition from contractors providing critical goods and services to the federal government, and such a draconian

change in longstanding federal contracting rules will irreparably harm good companies attempting to comply with complicated and evolving laws that federal agencies have a hard time complying with in many instances.

We thank you for addressing this important issue and look forward to working with Congress to improve and streamline the federal procurement process in a way that will result in a better system for taxpayers, contractors and the American workers.

Sincerely,



Geoffrey Burr
Vice President, Government Affairs

Chairman WALBERG. Hearing no objection, they will be submitted for the record.

It is now my pleasure to introduce our distinguished panel of witnesses.

First, Willis Goldsmith is a partner with Jones Day in New York. Mr. Goldsmith represents management in labor and employment law matters.

Welcome.

Angela Styles is a partner with Crowell & Moring LLP in Washington, D.C. Ms. Styles was a former administrator for federal procurement policy at the Office of Management and Budget.

Welcome.

Karla Walter is the associate director of the American Worker Project at the Center for American Progress in Washington, D.C. Ms. Walter's work focuses primarily on increasing workers' wages and benefits, promoting workplace protections, and advancing workers' rights.

Welcome.

And finally, Stan Soloway is the president and CEO of the Professional Services Council in Arlington, Virginia. The Professional Services Council is the principal national trade association representing the government professional and technical services industry.

Welcome.

I will now ask our panel of witnesses to stand and raise your right hand for being sworn in.

[Witnesses sworn.]

Let the record reflect the witnesses answered in the affirmative.

You may be seated.

Before I recognize you to provide your testimony, let me briefly remind you of the lighting system and encourage you to keep attention to that, at least with one eye, as you give your testimony. We don't want to become a hindrance to your testimony, but we do have time issues and we will have plenty of questions to ask you, as well.

The green light begins the process. You will have four minutes with that light on.

Then the yellow light will come on for the final minute. We would encourage you to wrap up as soon as possible within the context of your sentence or short paragraph when the red light comes on.

The same will be true for our members on the panel as we ask our questions, and we will keep to that five minute sequence also.

So with that, let me recognize Mr. Goldsmith for your five minutes of testimony.

TESTIMONY OF MR. WILLIS GOLDSMITH, PARTNER, JONES DAY, NEW YORK, NY, TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. GOLDSMITH. Thank you.

Chairman Walberg, Ranking Member Polis, Ranking Member Wilson, and members of the subcommittees, thank you for inviting me here to testify today. By way of background, I am a partner

with Jones Day, resident in our firm's New York City office. I have practiced labor and employment law for over 40 years.

Since 1974 I have advised employers regarding compliance with seven of the 14 federal statutes and regulations that are encompassed by the executive order. I have tried cases and argued appeals, including in six United States courts of appeals and in the United States Supreme Court, arising under various of those or related laws.

I am pleased to be here today on behalf of the United States Chamber of Commerce. As you know, the Chamber is the world's largest business federation, representing more than 3 million businesses of all sizes, industry sectors, and geographic regions. The *President's Fair Pay and Safe Workplaces Executive Order* will significantly and adversely impact many of these entities.

First, let me provide a brief overview of the executive order. The order requires contractors and subcontractors to self-report supposed violations of federal and state labor laws. Based on these reports, contracting officers must determine whether an entity is, "a responsible source that has a satisfactory record of integrity and business ethics."

In making that determination, the contracting officer consults with the agency's labor compliance advisor, an entirely new position created by the order. Contractors are likewise required to make responsibility determinations for the subcontractors.

The most fundamental problem with the executive order is that it oversteps the President's authority. Congress has already enacted detailed enforcement and penalty mechanisms for federal labor laws. The order improperly alters those regulatory schemes.

The order is also invalid because it encroaches on employers' rights under the *Federal Arbitration Act*. For contracts and subcontracts exceeding $1 million, the order prohibits employers from enforcing advance agreements to arbitrate certain claims. This prohibition impermissibly conflicts with employers' rights under the *Federal Arbitration Act*.

As if these problems weren't enough, the order is riddled with uncertainties that make it entirely unworkable. It is absolutely impossible to predict how it will work in the real world, except to say that it is certain to create chaos among contractors, subcontractors, and within agencies.

For example, the order requires entities to report any administrative merits determination, arbitral award or decision, or civil judgment. Leaving aside whatever those words mean—and they are not defined—even when an agency finds a violation through its administrative process, it is not at all uncommon for that decision to be reversed by a court.

That process can take many years, often due to agency inaction. It would be manifestly unfair to disqualify businesses from federal contracts simply based on violations that years later prove to be entirely baseless.

In addition, contractors are left simply to guess as to whether they must report all violations regarding all of their activities or whether they must report only violations involving the performance of a federal contract. A reporting requirement that extends to all

activities of a large corporate entity would flood agencies with information that may be entirely irrelevant to the contract at issue.

The order is likewise silent on which state law violations trigger the reporting requirement. The order applies to 14 federal labor laws, executive orders, and "equivalent state laws."

Depending on how equivalence is defined, contracting officers and labor compliance advisors may have to master literally hundreds of state laws. That simply cannot be done, period.

Finally, agencies must consider whether a violation is sufficiently serious—I am quoting—"serious, repeated, willful, or pervasive"—to warrant remedial action. Many of the included federal labor laws are themselves exceedingly complex.

Even the best-intentioned employers have run afoul of these laws in isolated circumstances or in situations where the rules are ill-defined. An employer that is ultimately found guilty of violating these laws is not necessarily a bad or unethical employer.

Finally, even courts struggle to interpret such terms as "repeated, willful, and pervasive." There is certainly no reason to believe that agencies are better equipped to do so. These terms will inevitably be applied inconsistently, further shrinking the pool of eligible contracts.

Moreover, as a practical matter the order is impossible to implement. As to contracting officers, it requires contracting officers to master a complex web of hundreds of interrelated and constantly evolving state and federal laws. I have been doing this for over 40 years and I know to a certainty I would not be able to do this, nor would any lawyer I have ever known be able to do so.

Then the order floods the contracting offices with information regarding violations, most of which will bear little relationship to an entity's integrity or business ethics. The contracting officers then are supposed to sift through this deluge of statutes and data, consult with a labor compliance advisor, and make a responsibility determination.

Then they have to do this every 6 months. This is just not achievable in the real world. There are comparable burdens imposed on contractors and subcontractors and may drive businesses from the contracting world—perhaps especially small businesses, including those run my minority—

Chairman WALBERG. Mr. Goldsmith, we have to ask you to wrap up your time—

Mr. GOLDSMITH. Thank you.

Chairman WALBERG.—and—

Mr. GOLDSMITH. The order is so deeply flawed in so many ways that it is simply beyond redemption. There is no way it could be modified or tweaked into something workable.

Thank you, Mr. Chairman.

[The testimony of Mr. Goldsmith follows:]

Statement of the U.S. Chamber of Commerce

ON: **The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat**

TO: **U.S. House of Representatives**
Committee on Education and the Workforce
Subcommittees on Workforce Protections and Health, Education, Labor and Pensions

DATE: **February 26, 2015**

BY: **Willis J. Goldsmith, Jones Day**

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Prepared Remarks of Willis J. Goldsmith

For testimony before the
United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections Jointly with the
Subcommittee on Health, Employment, Labor, and Pensions

February 26, 2015

Chairman Roe, Chairman Walberg, Ranking Member Polis, Ranking Member Wilson, and Members of the Subcommittees, thank you for inviting me to testify today.

By way of background, I am a partner with Jones Day, resident in our firm's New York City office. I have practiced labor and employment law for over forty years in New York and in Washington, D.C., and chaired our firm's labor and employment practice from 1991 through 2006. Since 1974, I have advised employers regarding compliance with seven of the federal statutes and/or regulations encompassed by the Executive Order, and tried cases and argued appeals — including in six United States Courts of Appeal and in the United States Supreme Court — arising under various of those or related laws as well as, in the language of the Executive Order, various "equivalent State laws".

I am pleased to be here today on behalf of the United States Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses of all sizes, industry sectors, and geographical regions. A significant portion of the Chamber's members are federal contractors and subcontractors. The Chamber also represents many state and local chambers of commerce and other associations which, in turn, represent many additional contractors and subcontractors. The Fair Pay and Safe Workplaces Executive Order will significantly impact these entities.

I realize my testimony is quite lengthy, but I think I can summarize the Chamber's objections to the Executive Order very quickly with the following points:

- First, the Alice in Wonderland-like structure of the Executive Order makes it completely unworkable in the real world, and no amount of "clarification" through rulemaking or guidance will cure this underlying problem. To the extent my testimony leaves any doubt on this matter, I believe the statements of the procurement experts testifying here today will make that point crystal clear. I realize that is a strong statement, but one that needs to be made and should be of concern to anyone, regardless of their political views.

- Second, the Executive Order is unnecessary. The laws identified in the Order already contain strong enforcement mechanisms to punish those who would violate those laws and only Congress can address any identified gaps in those enforcement mechanisms.

- Third, the Executive Order imposes extremely onerous and expensive compliance obligations on regulated contractors and subcontractors and, as a result, will drive many employers from the contracting world to the detriment of both the taxpayers who benefit from increased competition, and the employees who work for those companies.

- Fourth, the Order is simply, and fundamentally, unfair in that it may punish contractors and subcontractors for violations that have not yet been proven or finally adjudicated, thereby shortchanging companies' rights to due process and creating the potential that competitors and union corporate campaigns will misuse the data provided.

- Fifth, the Executive Order is so Byzantine and riddled with uncertainties that it will be impossible to predict how it will be applied in the contracting universe, leading to gross uncertainties among the regulated community as to who will qualify for a contract or not.

- Sixth, the Order imposes impossible burdens on those who will be charged within the agencies to implement it, in part driven by the enormous paperwork and in part driven by the impossibility of trying to untangle the enormous complexities of the laws involved.

- Lastly, the Executive Order clearly exceeds the President's executive authority and is unconstitutional.

Perhaps all of these logistical burdens would make sense to some degree if the Executive Order could accomplish an otherwise unattainable result. But there is little evidence to demonstrate that existing authorities are not, or could not be, effective to ensure that federal contractors comply with relevant labor laws. At bottom, the Executive Order is an unnecessary and duplicative administrative overreach that will harm agencies and the entities with which they contract. It will ultimately raise costs, hamper efficiency, and create delay and backlog in the procurement process. The House blocked similar efforts by the Clinton administration, and it should do the same here.

I. Executive Order: Fair Pay and Safe Workplaces

First, let me provide a brief overview of the President's Fair Pay and Safe Workplaces Executive Order. In addition to affirming the preexisting requirement that all federal contractors comply with labor laws, the Executive Order also imposes a new requirement on contractors and subcontractors to self-report labor law violations. The reporting requirement extends to "any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor" rendered against contractors or subcontractors within the preceding three years for violations of the following 14 federal labor laws and Executive Orders, as well as "equivalent State laws":

- the Fair Labor Standards Act;

- the Occupational Safety and Health Act of 1970;
- the Migrant and Seasonal Agricultural Worker Protection Act;
- the National Labor Relations Act;
- the Davis-Bacon Act (40 U.S.C. chapter 31, subchapter IV);
- the Service Contract Act (41 U.S.C. chapter 67);
- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
- Section 503 of the Rehabilitation Act of 1973;
- the Vietnam Era Veteran's Readjustment Assistance Act of 1972 and the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (38 U.S.C. 3696, 3698, 3699, 4214, 4301-4306);
- the Family Medical Leave Act;
- Title VII of the Civil Rights Act of 1964;
- the Americans with Disabilities Act of 1990;
- the Age Discrimination in Employment Act of 1967; and
- Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).[1]

In other words, the Executive Order covers close to the entire landscape of labor and employment law. Each of these laws is highly complex and is continuously evolving through extensive rulemaking and/or litigation.[2] And, of course, as elaborated upon below, "administrative merits determination[s], arbitral award[s] or decision[s] or civil judgment[s]" are subject to being set aside on appeal.

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[1] Exec. Order No. 13673, 79 Fed. Reg. 45,309 (Aug. 5, 2014, amended Dec. 11, 2014) ("E.O.") § 2(a)(i)(A)-(O).

[2] To say that employment law is highly complex is indeed an understatement. The underlying statutes are in turn interpreted by thousands of pages of fine print in the Code of Federal Regulations, as well as thousands of court cases. One leading treatise on employment discrimination law stretches over 3,500 pages and two volumes. *See* Lindemann, Grossman, & Weirich, EMPLOYMENT DISCRIMINATION LAW (4th ed. 2007). A treatise on the National Labor Relations Act comes in at just under 3,500 pages and stretches over two volumes. *See* Higgins, THE DEVELOPING LABOR LAW (5th ed. 2006). A treatise on the Occupational Safety and Health Act runs over 1,200 pages. *See* Rabinowitz, OCCUPATIONAL SAFETY & HEALTH LAW (2d ed. 2002). Each of these volumes also has supplements, adding hundreds more pages of text. As any practitioner would admit, these treatises simply provide an employer with an initial window into its compliance obligations. In sum, the seemingly simple naming of the laws listed in the Executive Order is only the very tip of a very large and complex iceberg.

The Executive Order also requires contracting officers to make responsibility determinations and, in consultation with the agency's Labor Compliance Advisor (an entirely new position created by the Executive Order), to determine whether the contractor is "a responsible source that has a satisfactory record of integrity and business ethics."[3] A contractor, in turn, is required to make similar responsibility determinations for its subcontractors, also in consultation with the Labor Compliance Advisor.[4]

When a contract is being performed, contractors and subcontractors must update information regarding labor law violations every six months.[5] If that information discloses a violation, the contracting officer must consult with the Labor Compliance Advisor and consider whether any action is necessary.[6] Such action may include agreements requiring remedial measures, compliance assistance, decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official.[7]

These aspects of the Executive Order apply to all contracts and subcontracts, including construction contracts, expected to exceed $500,000.[8]

In addition, for all contracts and subcontracts with an estimated value exceeding $1 million, new solicitation and contracts clauses are required to enforce an employer's contractual right to arbitrate Title VII claims or any tort claims arising from sexual assault or harassment.[9] Even if the employee has signed an agreement to arbitrate such claims, the employer may enforce that agreement only if the employee or independent contractor voluntarily consents to arbitration a second time, *after* the claim arises.

To implement the Executive Order, the President has directed several amendments to the Federal Acquisition Regulations ("FAR"), including accounting for and providing guidance for determining whether "serious, repeated, willful, or pervasive violations" of the included labor laws demonstrate a lack of integrity or business ethics.[10] The breathtaking scope of the Executive Order's language virtually ensures that no Labor Compliance Advisor, much less any agency contracting officer — however well-intentioned either or both might be — will be able to perform their mandated functions with anything approaching a reasonable degree of consistency, correctness, or predictability.

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[3] E.O. § 2(a)(iii).

[4] E.O. § 2(a)(iv)(B); § 2(b)(iii).

[5] E.O. § 2(b)(i).

[6] E.O. § 2(b)(ii).

[7] *Id.*

[8] E.O. § 2(a)(i); § 2(a)(iv).

[9] E.O. § 6(a).

[10] E.O. § 4(b)(i).

II. The Executive Order is an Administrative Overreach

At the most fundamental level, the Executive Order is an impermissible and unnecessary administrative overreach.

First, the Executive Order alters the enforcement mechanisms that Congress has established for the underlying statutes. For each of those laws, Congress has created detailed enforcement schemes which, in some cases, have been in place for decades and which often include significant financial penalties. For example, employers that violate OSHA may be fined up to $70,000 for each violation of a particular type.[11] The EEOC has authority to enforce Title VII and the ADA through conciliation proceedings and in federal court.[12] Other federal labor laws included in the Executive Order have similar enforcement mechanisms.[13] In addition to incentivizing compliance by penalizing violations, these statutory schemes reflect legislative determinations regarding the appropriate balance to strike in these sensitive areas of the law.

In light of the comprehensive and detailed nature of these statutory remedial schemes, the President's action oversteps the bounds of his authority. By directing the Department of Labor to develop guidance that will establish levels of violations that are not included in the underlying statutes,[14] the Executive Order alters the enforcement mechanisms that Congress has established for these laws. In particular, it changes the penalties that Congress envisioned for these laws. Contractors may even suffer "double jeopardy" as a result of the Executive Order's additional penalties for noncompliance. The President simply does not have the authority to take these steps.[15] This is particularly obvious with respect to the NLRA, where — in addition to the traditional principles articulated in *Youngstown Sheet & Tube Co.*[16] — the President has no authority to provide his "own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act."[17]

Second, the Executive Order is invalid to the extent that it encroaches on employers' rights under the Federal Arbitration Act ("FAA"). The FAA gives employers the right to require

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[11] 29 U.S.C. § 666(a).

[12] 42 U.S.C. § 2000e-5; 42 U.S.C. § 12117(a) (incorporating enforcement proceedings available under Title VII into ADA).

[13] *See, e.g.*, 29 U.S.C. § 626 (ADEA enforcement provisions); 29 U.S.C. § 162 (NLRA penalties); 29 U.S.C. § 216 (FLSA penalties); 29 U.S.C. § 659 (OSHA enforcement procedures).

[14] E.O. § 4(b)(i)(B).

[15] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb ...."); *United States v. East Texas Motor Freight Sys., Inc.*, 564 F.2d 179, 185 (5th Cir. 1977) ("an order of the Executive has the force of law only if it is not in conflict with an express statutory provision") (internal quotation marks omitted); *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986); *see also Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1337-39 (D.C. Cir. 1996).

[16] 343 U.S. at 637 (Jackson, J., concurring).

[17] *Gould*, 475 U.S. at 286; *see Reich*, 74 F.3d at 1338-39 (applying *Garmon* preemption to invalidate Executive Order).

employees to agree to pre-dispute arbitration clauses.[18] Well-settled case law confirms that this right extends to Title VII claims.[19] Indeed, as to this issue, every court of appeals has recognized that employers have the right to require employees to agree to pre-dispute arbitration of any future claims arising under Title VII.[20] The President has no authority to restrict employers' rights under the FAA, yet the Executive Order does just that.[21]

III. The Extent of the Executive Order's Overreach is Unclear

As if these problems were not enough, the extent of the Executive Order's administrative overreach remains uncertain. We know the Executive Order is too broad; but because it contains several ambiguities, we do not yet know exactly how far it will extend.

a. What is an "administrative merits determination"?

As already noted, the Executive Order requires contractors and subcontractors to report "any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor."[22]

But what constitutes an "administrative merits determination"? For the time being, federal contractors and subcontractors are left to guess. Preliminary reports suggest that forthcoming DOL guidance may interpret the phrase broadly to include such things as an EEOC probable cause determination, an NLRB decision to issue an unfair labor practice complaint, or an OSHA citation — in other words, actions by the agency that have not yet been subject to any form of judicial or even quasi-judicial review and that attach to a contractor before it has been given the opportunity to exhaust its due process rights. Labeling such decisions as

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[18] 9 U.S.C. § 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[19] *See, e.g., Weeks v. Harden Manufacturing Corp.*, 291 F.3d 1307, 1313-14 (11th Cir. 2002) (affirming employers' right to require mandatory arbitration of claims under Title VII and collecting cases from other courts of appeal).

[20] *See EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc); *Weeks*, 291 F.3d at 1313-14; *Desiderio v. National Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 204-06 (2d Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

[21] Contrast the President's attempt to restrict employers' rights under the FAA with the congressionally enacted limitation under the FY 2010 Department of Defense Appropriations Act (the "Franken Amendment"). Ironically, although this amendment is clearly the inspiration for this provision of the Executive Order, rather than bolster the argument for this provision, the comparison highlights the illegitimacy of trying to do this through an executive order.

[22] E.O. § 2(a)(i).

"administrative merits determinations" — possibly even while pending appeal — makes no sense because such "determinations" are not final, or necessarily even close to final.

Defining the phrase "administrative merits determinations" to include agency determinations that are not "final", and thus not yet subject to judicial review, is improper. An employer issued an OSHA citation or an unfair labor practice complaint, for example, must first exhaust the administrative process through the ALJ and agency board before challenging the agency's action in court.[23] Requiring employers to report unadjudicated agency actions before they even have an opportunity to challenge the agency's judgment on the issue would be fundamentally unfair and highly inappropriate. Our legal system provides those alleged to have violated laws the opportunity to defend themselves to the extent they wish. Until a party has no other recourse, or has agreed to a settlement, it should not have its eligibility for a federal contract undermined; this is an improper second penalty imposed based solely on an agency's claims. Stated otherwise, if active and non-final labor determinations and complaints are considered by the contracting officer as part of the responsibility determination, an employer may lose a contract as a result of mere allegations.

Another consequence of allowing non-final charges to be held against contractors is that doing so could be used as leverage to force settlement of matters that a company would otherwise contest. Contractors facing allegations or citations, knowing that contesting them to the point of exoneration will not benefit them, will likely cut their losses and accept an unfavorable settlement. With millions of dollars in contracting in the balance, the priority will be on preserving their contracting status rather than fighting a citation or other allegation, regardless of how meritless these allegations may be.

This is particularly troublesome given that a significant number of allegations are prompted by union corporate campaigns. In a coercive attempt to secure their demands, unions often bury employers with all sorts of spurious allegations involving, among other things, claims under the statutes included in the Executive Order.[24] OSHA, in particular, often plays a prominent role in many union corporate campaigns, and the number of OSHA complaints is significantly higher among employers experiencing labor unrest.[25]

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[23] *See, e.g.*, *Northeast Erectors Ass'n v. Secretary of Labor*, 62 F.3d 37, 40 (1st Cir. 1995) (holding that federal courts have no jurisdiction to review pre-enforcement challenge to OSHA citation); *Vapor Blast Mfg. Co. v. Madden*, 280 F.2d 205, 209 (7th Cir. 1960) (NLRB decision to file complaint is not final agency action); *Irwindale Div. of Lau Indus. v. NLRB*, No. 74-2206, 1974 U.S. Dist. LEXIS 6450 (C.D. Cal. Oct. 3, 1974) (dismissing for lack of jurisdiction complaint seeking to enjoin pending NLRB complaint for unfair labor practices); *see Gerator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979) (EEOC cause determination is not final agency action for purposes of APA); *Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 836 (D.C. Cir. 2001) (same); *Bell Atl. Cash Balance Plan v. EEOC*, 976 F. Supp. 376, 380-81 (E.D. Va. 1997) (same).

[24] *See generally* Jarol B. Manheim, TRENDS IN UNION CORPORATE CAMPAIGNS (U.S. Chamber of Commerce 2005) (discussing background and evolution of methodology behind union corporate campaigns), *available at* https://www.uschamber.com/sites/default/files/legacy/reports/union_booklet_final_small.pdf.

[25] U.S. Gov't Accountability Office, GAO/HEH5-00-144, *Worker Protection: OSHA Inspections at Establishments Experiencing Labor Unrest*, at 5 (Aug. 2000), *available at* http://www.gao.gov/new.items/he00144.pdf (entities experiencing labor unrest are 6.5 times more likely to be inspected by OSHA than entities not experiencing labor unrest); Howard Mavity, *Multiple Embarrassing OSHA*

Relying on mere allegations would not only be unfair to employers; it would also overwhelm the contracting officer and Labor Compliance Advisor with information about active and non-final agency determinations — proceedings that, due to their preliminary nature, have little probative value in assessing a contractor's "record of integrity and business ethics."[26] The EEOC, for example, receives nearly 100,000 charges a year, but not even 0.5% of those charges mature into lawsuits.[27] Once again, it makes no sense to require contractors and subcontractors to report mere allegations as "merits determinations". Allegations simply are not anything of the sort.

It is important to understand in this context that agency allegations often turn out to be meritless. Thus, even final agency decisions concluding that an employer violated labor laws are often subsequently overturned by a court. Indeed, between 1974 and 2013, courts of appeals reversed or remanded NLRB decisions approximately 30% of the time.[28]

Defining "administrative merits determinations" to include allegations would be unfair in situations where an agency finds a labor violation through its administrative process and the violation is later overturned in court. As noted, this happens frequently,[29] but never quickly. The average administrative agency appeal takes more than a year to resolve once it gets to court,[30] but it is not uncommon for the adjudication process to drag on for a decade or more due to agency inaction. For example, in *Entergy Mississippi, Inc. & International Brotherhood of Electrical Workers*,[31] 11 years passed between the initial charge and the NLRB's resolution. And in *Dayton Tire, a Division of Bridgestone Firestone, Inc. v. Secretary of Labor*,[32] a case in which I served as lead trial and appellate counsel for Dayton Tire throughout the entirety of the case, the D.C. Circuit remanded the case for OSHRC to reassess liability 18 years after the initial OSHA citation. Nor was the delay related in any way to employer inaction; the case went to trial less than a year after the citation issued, but the OSHRC failed to act for more than 12 years on the appeal once it was fully briefed. These cases are not outliers. In *Simon DeBartolo Group*,[33]

(continued...)

Citations: The Next Union Organizing Tactic? (June 1, 2010), *available at* http://www.laborlawyers.com/multiple-embarrassing-osha-citations-the-next-union-organizing-tactic.

[26] E.O. § 2(a)(iii).

[27] EEOC Litigation Statistics, FY 1997 Through FY 2014, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[28] NLRB Appellate Court Decisions, 1974-2013, *available at* http://www.nlrb.gov/news-outreach/graphs-data/litigations/appellate-court-decisions-1974-2013. NLRB appeals represent more than 20% of all administrative agency appeals. *See* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B03Sep13.pdf (data excludes the Court of Appeals for the Federal Circuit and excludes BIA appeals, which comprise the overwhelming majority of all administrative agency appeals).

[29] *See id.*

[30] http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B04CSep13.pdf.

[31] 361 N.L.R.B. No. 89 (Oct. 31, 2014).

[32] 671 F.3d 1249 (D.C. Cir. 2012).

[33] 357 N.L.R.B. No. 157 (Dec. 30, 2011).

more than 11 years passed between the initial charge and the NLRB's resolution, and in *New York New York Hotel & Casino*,[34] the NLRB issued a decision on remand from the D.C. Circuit almost ten years after the Board's original decision. It is profoundly unfair to require employers to report these violations for years, even as they attempt — in the face of agency inaction — to clear their names.

As a practical matter, the length of time that it takes to adjudicate these matters counsels against considering them at all. The Order requires entities to report decisions "rendered" in the previous three years.[35] Today, for Bridgestone, that would include the Dayton Tire matter because the final decision issued in 2013. But how can that matter, which dealt with events that occurred in the early 1990s at a facility that is no longer open, possibly have any bearing on the company's integrity and business ethics today?

Reliance on mere allegations, rather than final adjudications, is particularly troubling when the Supreme Court has not spoken on the underlying legal question, and the agencies in question refuse to follow relevant appellate precedent. Examples of this abound. In *D.R. Horton, Inc. v. NLRB*,[36] the NLRB took the position—rejected by every court of appeals that has addressed it—that employee class action waivers violate Section 7 of the NLRA.[37] The Fifth Circuit rejected the NLRB's cavalier interpretation, joining three other circuits and holding that arbitration agreements containing class waivers are enforceable.[38]

But even these uniform decisions do not provide full assurance to employers. As demonstrated by the NLRB's recent decision in *Murphy Oil USA, Inc.*,[39] which reaffirmed the Board's views on employee class action waivers, the NLRB generally refuses to acquiesce to any court of appeals decision with which it disagrees. This means that the exact same labor practices may result in a violation in one jurisdiction but not another. Indeed, that is exactly what happened to Murphy Oil, whose practices were perfectly lawful in the Second, Fifth, Eighth, and Ninth Circuits.[40] Thus, if the NLRB issues a complaint in one of the eight circuits that has not addressed the enforceability of employee class action waivers, that violation could lead to debarment or remedial action under the Executive Order — even though every court to address the issue has approved such practices and repudiated the NLRB's position. In these instances, it is unclear whose view should prevail for purposes of determining whether a violation has occurred. Moreover, this uncertainty will persist until the NLRB believes the issue is settled — either by the U.S. Supreme Court or by uniform decisions from every court of appeals, which obviously could take years.

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[34] 356 N.L.R.B. No. 119, 2011 NLRB LEXIS 130 (Mar. 25, 2011).

[35] E.O. § 2.

[36] 737 F.3d 344 (5th Cir. 2013).

[37] 29 U.S.C. § 157.

[38] *D.R. Horton*, 737 F.3d at 362.

[39] *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (Oct. 28, 2014).

[40] *See D.R. Horton*, 737 F.3d at 362.

b. How broad is the reporting requirement?

In a related vein, the Executive Order is unclear whether self-reporting is limited to violations issued "in connection with the award or performance ... of a Federal contract," similar to the current reporting obligations under the Federal Awardee Performance and Integrity Information System,[41] or if the requirement extends to all activities of the corporate entity. As written, the Executive Order appears to cover any violation regardless of whether it occurred in the course of performing a federal contract. Particularly for large employers, a reporting requirement that extends to all activities of the corporate entity will inundate the contracting officer and Labor Compliance Advisor with information that will almost certainly have little relevance to the contract at issue. A flood of unnecessary information would further complicate these officials' already formidable tasks.

c. What are "equivalent State laws"?

As noted above, the Executive Order extends to 14 federal labor laws and Executive Orders, as well as "equivalent State laws."[42] But some of the federal provisions listed are not actually laws. Neither the "Paycheck Transparency" provision in this Executive Order[43] nor Executive Order 13658 raising the minimum wage for federal contractors[44] has been enacted by Congress. Yet the Administration is elevating these provisions to the full status of laws and holding employers accountable for any state equivalents.[45]

In addition, the number of "equivalent state laws" is potentially vast. Many states have their own state OSH plans[46] and minimum wage and overtime laws[47], not to mention laws governing paid leave and civil rights. Moreover, because such laws often apply to smaller employers than their federal counterparts, the pool of businesses subject to the Executive Order is enormous. In New York, for example, an employer with just four employees is subject to at

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[41] 48 C.F.R. 52.209-7 (2013).

[42] E.O. § 2(a)(i)(O); *see* E.O. § 5(a).

[43] E.O. § 5.

[44] Exec. Order No. 13658, 79 Fed. Reg. 9,851, (Feb. 20, 2014).

[45] *See* E.O. § 2(a)(1)(N); § 5(a).

[46] Merely because a state maintains its own safety and health law (known as a State Plan State) does not mean its law is exactly equivalent. In many cases, states have requirements in their state occupational safety and health plan that are either more stringent than the federal counterpart, or for which there is no federal equivalent. For instance California, which is a State Plan State, requires employers to comply with regulations on ergonomics and maintaining an Injury and Illness Prevention Program, neither of which are required under the federal Occupational Safety and Health Act. *See* Cal. Code Regs. tit. 8 § 3203; Cal. Code Regs. tit. 8 § 5110. California also has a separate list of levels restricting exposure to hazardous chemicals. Cal. Code Regs. tit. 8 § 5155.

[47] California also maintains a very different set of exemptions from overtime compensation than the federal scheme including requiring employers to demonstrate that employees are spending more than 50% of their time performing specific duties, rather than the qualitative standard that applies at the federal level. *See* Cal. Code Regs. § 515(e).

least 11 different state laws.[48] This means that, for federal contractors located in New York, contracting officers and Labor Compliance Advisors must understand and evaluate violations of at least 25 different state and federal laws — and even more if local and municipal regulations are considered.

State antidiscrimination laws, in particular, are considerably broader than their federal counterparts. For example, while Title VII does not apply to employers with fewer than 15 employees,[49] state antidiscrimination laws generally apply to very small employers.[50] State antidiscrimination laws also typically prohibit discrimination on much broader grounds than Title VII. For example, in Alaska, an employer with just one employee is prohibited from discriminating on the basis of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy, or parenthood.[51] Is a law that extends broader protections to a broader set of employees than its federal counterparts "equivalent"?

Depending on how equivalence is defined, there may be literally hundreds of "equivalent State laws". A contracting officer and the Labor Compliance Advisor not only need to understand each such law; he or she will also need to understand how different state laws relate to other state laws — from the same or different states — as well as applicable federal laws. Different state laws may also have different terminology defining the severity of violations. The Labor Compliance Advisors and contracting officers will have to reconcile these variations with the federal terms. This will be no small feat, and basically impossible to achieve. In addition, state laws are moving targets, frequently undergoing changes. But without such extensive expertise, the contracting officer will not be able to make accurate or consistent responsibility determinations.

This is particularly true with respect to large employers operating in multiple states who may be alleged to have violated several different state or federal laws for a single, company-wide policy. By way of example, large employers often have corporate social media policies, restricting posts on Facebook and other social media that "damage the Company, defame any individual or damage any person's reputation", or reveal "confidential information", such as employees' names and addresses, and information about FMLA leave or ADA accommodations.[52] In light of recent decisions from the NLRB invalidating such polices which,

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[48] New York Business Litigation and Employment Attorneys Blog, *Which New York Employment Laws Apply to My Small Business?* (Apr. 2, 2013), *available at* http://www.davidrichlaw.com/new-york-business-litigation-and-employment-attorneys-blog/2013/04/which-new-york-employment-laws-apply-to-my-small-business/.

[49] 42 U.S.C. § 2000e(b).

[50] *See, e.g.*, Alaska Stat. § 18.80.300(5) (1 or more employees); N.M. Stat. Ann. §§ 28-1-2 (4 or more employees); Ohio Rev. Code Ann.. § 4112.01(a)(2) (4 or more employees); Cal. Gov. Code § 12926(d); (5 or more employees); Tenn. Code Ann. § 4-21-102(5) (8 or more employees); Wash. Rev. Code § 49.60.040(11) (8 or more employees).

[51] Alaska Stat. § 18.80.200.

[52] *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, at 1 (Sept. 7, 2012); *see also Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012) (invalidating policy that required employees to be "courteous, polite and friendly" to

to be sure, are decidedly unclear,[53] an employer may face numerous violations of the NLRA based on one policy. Furthermore, because social media policies are critical to an employer's defense against Title VII harassment claims,[54] an employer attempting to navigate the tension between the NLRA and Title VII may inadvertently run afoul of both statutes, as well as any "equivalent state laws" — again, all for a single policy. Without a thorough understanding regarding the relationship and overlap between such supposed violations, a contracting officer cannot make accurate and consistent responsibility determinations.

For all of these reasons, the Administration has set itself an impossible and constantly changing task.

d. What constitutes "serious, repeated, willful, or pervasive"?

Contracting officers, along with the Labor Compliance Advisors, are also tasked with determining whether violations are sufficiently "serious, repeated, willful or pervasive" to warrant remedial action.[55] This is so even though courts often disagree about the meaning of these terms. How then could DOL fairly be called upon to define these phrases to allow for some level of consistency in responsibility determinations and remedial actions? Yet the definitions and guidance must be clear before a FAR Council should be permitted to proceed.

Many of the included federal labor laws are exceedingly complex and are extremely challenging for employers to implement correctly. Even the best-intentioned employers have run afoul of these laws in isolated circumstances or in situations where the rules remain ill-defined. As currently written, the Executive Order presumes clarity where it does not exist and unfairly slants the field against contractors with even minor infractions, which may indicate little or nothing about the company's actual workplace standards.

Even deliberate violations of certain laws may say nothing about an entity's integrity or business ethics. Consider that under the NLRA an employer that objects to a bargaining unit determination made by the NLRB has no direct right to appeal the decision to the courts. Instead, an employer who wishes to challenge the bargaining unit determination must refuse to bargain with the union, commonly known as a "technical" violation of § 8(a)(5) of the NLRA.

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customers, vendors, suppliers, and co-workers, and prohibited "disrespectful [conduct] or [the] use [of] profanity or any other language which injures the image or reputation of the Dealership").

[53] *Triple Play Sports Bar & Grille*, 361 N.L.R.B. No. 31 (Aug. 22, 2014) (holding that employer violated NLRA when it discharged two employees for Facebook posts that the employer deemed "disparaging and defamatory"); *Knauz BMW*, 358 N.L.R.B. No. 164; *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106.

[54] *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2442 (2013) (employer may escape vicarious liability for harassment by establishing, among other things, that it "exercised reasonable care to prevent and promptly correct any harassing behavior"); EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, *9 ("It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. ... An anti-harassment policy and complaint procedure should contain ... [a] clear explanation of prohibited conduct.").

[55] E.O. § 3(d)(i).

Only after the Board finds that the employer has committed this technical violation can the employer challenge the bargaining unit determination in court. This technical violation has no bearing on the entity's integrity or business ethics. Indeed, it is necessary and perfectly appropriate in order to challenge erroneous unit determinations – which, after all, may force union representation on employees who do not want it – and yet the Executive Order may exclude entities from federal contracts on this basis. This is one example of how the Executive Order could exclude a contractor on a plainly inappropriate basis.

"Serious" and "repeated" violations may also be an unreliable proxy for assessing an entity's integrity or business ethics. Any business — and especially a large employer with numerous worksites — can accumulate "serious" and "repeated" violations very quickly. But what do the terms mean? For example, under OSHA, a violation is "serious" if there is the potential for an employee to have been harmed as a result of the violation — regardless of whether anyone was actually harmed.[56] And a "repeated" violation is any violation for the same or substantially similar standard within 5 years, at any location.[57] Given this low threshold, any large employer with several worksites could have "repeated" violations, at least as OSHA defines that term. Indeed, as a result of the Administration's changes in OSHA enforcement, the number of willful and repeat violations increased by more than 215% between 2006 and 2010.[58] Subsequent changes by this Administration, including the decision in 2011 to expand the window for repeat violations from 3 years to 5 years,[59] have expanded the definition of "repeated" such that it has no logical nexus to a business's ethics or integrity.

If the purpose of the Executive Order is to identify entities with a "track record[] of non-compliance,"[60] whatever that may mean, looking at higher-level violations — such as those that are willful or pervasive (notwithstanding the complete absence of the term "pervasive" in any of the statutes listed) — might appear to make more sense. But imposing new penalties based on such violations is still problematic not only from a definitional perspective but also because, as already discussed, doing so alters the enforcement scheme enacted by Congress and would put a contracting officer in a position to make decisions that courts are often unable to make with any degree of consistency.

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[56] 29 C.F.R. § 1960.2(v).

[57] OSHA, *Employer Rights and Responsibilities Following an OSHA Inspection* (2014), at 8, *available at* https://www.osha.gov/Publications/osha3000.pdf; OSHA, *OSHA Administrative Penalty Information Bulletin*, *available at* https://www.osha.gov/dep/administrative-penalty.html; *OSHA's Field Operations Manual*, at 4:31-4:34 (Nov. 9, 2009), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf.

[58] Alexis M. Downs and Eric J. Conn, *Enterprise Enforcement: OSHA's Attacks on Employers with Multiple Locations* (Feb. 29, 2012), *available at* http://www.oshalawupdate.com/2012/02/29/enterprise-enforcement-oshas-attack-on-employers-with-multiple-locations/; OSHA, *OSHA Enforcement: Committed to Safe and Healthful Workplaces*, *available at* https://www.osha.gov/dep/2010_enforcement_summary.html.

[59] OSHA Administrative Penalty Bulletin (Mar. 27, 2012), *available at* https://www.osha.gov/dep/enforcement/admin_penalty_mar2012.html.

[60] E.O. § 1.

IV. The Executive Order Will be Impossible to Implement

In light of its breadth and complexity, the Executive Order will be impossible to implement at every level.

Let's start with contracting officers, the government employees most directly involved in the procurement process. The Executive Order complicates each and every aspect of these individuals' already difficult jobs. First, it requires them to master a complex web of hundreds of interrelated state and federal laws. That, alone, is impossible for any one person or even a group of people to accomplish. Then it inundates them with a flood of information regarding violations — most of which, for all the reasons I have discussed, have little bearing on an entity's integrity or business ethics. Contracting officers must sift through this deluge of data, consult with the Labor Compliance Advisor, and make a responsibility determination. Even then, however, the contracting officer's tasks are not complete: He or she must repeat this process every six months. This simply is not doable in the real world.

These burdens are entirely unnecessary and completely impractical. Faced with burgeoning workloads and pressure to get contracts awarded quickly, contracting officers may simply avoid making any award to a contractor with any supposed labor violation. Because many violations have no bearing on an entity's integrity or business ethics, this practice would unnecessarily bar hundreds of competent and capable entities from federal contracts. Artificially reducing the pool of eligible businesses is hardly likely to "enhance productivity" or "increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government" as the Executive Order is purportedly designed to do.[61]

By imposing substantial burdens on contractors and subcontractors, the Executive Order is likely to unnecessarily decrease the number of qualified bidders, further increasing costs to the government without any discernible benefit. As an initial matter, it will be difficult for contractors and subcontractors to accurately self-report and update violations. For large employers that operate in several states, the number of applicable federal and state laws may be in the hundreds. Moreover, as already noted, the Executive Order apparently extends the reporting requirement to *all* violations — not just those that occurred during the performance of a federal contract. To say it would be extremely onerous, burdensome, and costly for contractors to update both their own and their subcontractors' information every six months is, to put it mildly, a considerable understatement.

Regardless of whether a potential contractor has a labor law violation, the reporting requirement and the burden associated with collecting subcontractor information will serve as yet another barrier to entry for companies that are considering entering the federal market — particularly given that a contractor could be criminally prosecuted for failing to list any violations.[62] These burdens will disproportionately affect small businesses and, in turn, further restrict opportunities for women and minorities. Small businesses are an especially important

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[61] *Id.*

[62] *See* 18 U.S.C. § 1001.

entry point into the economy for these groups,[63] and federal contracts present tremendous opportunities for growth.[64] But women and minority-owned small businesses are underrepresented among federal contractors,[65] and the Federal Government routinely fails to meet the statutorily mandated contracting goals.[66] This Executive Order imposes yet another obstacle to their success. Thus, this and the other recent contractor-focused executive orders run counter to the Administration's rhetoric about increasing access to the federal marketplace.[67]

Contractors also face the additional burden of making an initial responsibility determination for subcontracting entities.[68] This assessment will require contractors to master the infinite web of interrelated state and federal laws. They will also need assistance from Labor Compliance Advisors to make determinations about the responsibility of their subcontractors. Labor Compliance Advisors, in turn, will need extensive training on effective mitigation techniques implemented by contractors to ensure present responsibility. For some large prime contractors that have several thousand subcontractors and suppliers, the reliance on the Labor Compliance Advisor could be tremendous.

This brings me to one of the key obstacles facing implementation of the Executive Order: There is no existing infrastructure to support its implementation. In order for the Executive Order to be implemented in a workable manner, the federal agencies will have to hire a

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[63] SBA, *The Small Business Economy: A Report to the President*, at 11 (2009), *available at* http://archive.sba.gov/advo/research/sb_econ2009.pdf; IFA Educational Foundation, Inc., *Franchised Business Ownership: By Minority and Gender Groups* (2011), *available at* http://www.mbda.gov/sites/default/files/MinorityReport2011.pdf; U.S. Dept. of Commerce, Minority Business Development Agency, *Executive Summary: Disparities in Capital Access Between Minority and Non-Minority Businesses*, at 3 (Jan. 2010), *available at* http://www.mbda.gov/pressroom/publications/executive-summary-disparities-capital-access-between-minority-and-non-minority-businesses; U.S. Department of Commerce, Economics & Statistics Administration, *Women-Owned Businesses in the 21st Century* (Oct. 2010), *available at* http://www.esa.doc.gov/Reports/women-owned-businesses-21st-century.

[64] *Women and Minority Federal Small Business Contractors: Greater Challenges, Deeper Motivations, Different Strategies, and Equal Success*, at 6-7, *available at* http://www.womenable.com/content/userfiles/VIP-women_and_minority_report_public.pdf.

[65] *Id.* at 5-6.

[66] *See* U.S. Gov't Accountability Office, GAO-09-16, *Agency Should Assess Resources Devoted to Contracting and Improve Several Processes in the 8(a) Program* (Nov. 2008) (reporting that more than half of agencies surveyed failed to meet at least two contracting goals or other criteria), *available at* http://www.gao.gov/assets/290/283654.pdf; Nat'l Ass'n of Gov't Contractors, *Enforce Small Business Procurement Goals: Agencies Continue to Fall Short of Their "Goals", available at* http://web.governmentcontractors.org/content/letters/Enforce_Small_Business_Procurement_Goals.aspx; *see also* Max Timko, *Failed Efforts to Create Federal Transparency: Over $600 Billion Goes Undocumented While Government Celebrates Small Business Goals* (Aug. 11, 2014), *available at* http://governmentcontractingtips.com/2014/08/11/failed-efforts-create-federal-transparency-600-billion-goes-undocumented-government-celebrates-small-business-goals/.

[67] *See, e.g.*, Exec. Order 13665, 79 Fed. Reg. 20,749 (Apr. 8, 2014) (prohibiting federal contractors from retaliating against employees who disclose compensation information); Exec. Order No. 13658, 79 Fed. Reg. 9,851, (Feb. 20, 2014) (raising minimum wage for federal contractors); Exec. Order 13495, 74 Fed. Reg. 6,103 (Jan. 30, 2009) (nondisplacement of qualified workers under federal service contracts).

[68] *See* E.O. § 2(a)(iv)(B).

significant number of new staff to serve as — and support — the newly created role of Labor Compliance Advisor. Within the Department of Defense alone, the Labor Compliance Advisor would be required to support the activities of approximately 24,000 contracting officers and hundreds of contracting entities.[69]

Even if the federal government could somehow relatively quickly ramp up its capacity to provide Labor Compliance Advisors and related resources to federal agencies and prime contractors, a great deal of time would be needed to effectively train personnel in the new positions to correctly carry out their duties in a fair and consistent manner. Given the complexity of federal and state laws this is likely to be a difficult and time consuming task. The cost of hiring and training new personnel will be staggering.

The costs that U.S. companies incur in their efforts to comply with state and federal labor laws provides meaningful insight to the resources needed to implement the Executive Order. Employers spend $2.028 trillion on compliance (an average of $233,182, or 21% of payroll)[70] and even with extreme vigilance and good faith they can still find themselves with citations — even repeat citations that, under the terms of the Executive Order, could jeopardize their contracting status. The costs of equipping Labor Compliance Advisors for their tasks under the Executive Order are astounding, yet the Executive Order is silent as to who will bear them.

V. History Has a Way of Repeating Itself: The Clinton Administration's Blacklisting Regulation

This Executive Order is reminiscent of the Clinton administration's failed blacklisting regulation. In February 1997, former Vice President Al Gore spearheaded a proposal that would "seek to bar companies with poor labor records from receiving government contracts."[71] Among other things, the Clinton regulation would have required contracting officers to make "responsibility determinations" by assessing whether the contractor had "a satisfactory record of integrity and business ethics, including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws."[72] In making that determination, contracting officers would have been required to consider "all relevant credible information." They were directed to consider not only convictions and court findings of unlawful practices, but also adverse agency decisions and "other relevant information such as civil or administrative complaints or similar actions."[73]

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[69] Jason Miller, *Jordan Exits OFPP Knowing Progress Toward Buying Smarter is Real*, FEDERAL NEWS RADIO (Jan. 17, 2014), *available at* http://www.federalnewsradio.com/517/3544369/Jordan-exits-OFPP-knowing-progress-toward-buying-smarter-is-real.

[70] W. Mark Crain and Nicole V. Crain, *The Costs of Federal Regulation to the U.S. Economy, Manufacturing, and Small Business*, A Report for the National Association of Manufacturers (Sept. 2014), *available at* http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.

[71] Dan Balz and Frank Swoboda, *Gore, Gephardt Court Organized Labor in Precursor to 2000 Campaign*, THE WASHINGTON POST at A14 (Feb. 19, 1997).

[72] § 9.104-1(d), 65 Fed. Reg. 80,256, 80,264 (Dec. 20, 2000).

[73] § 9.104-3(c)(1), 65 Fed. Reg. at 80,265.

For many of the reasons discussed above, the regulation was viewed as very controversial by both the business community and a bipartisan coalition of Members of Congress. Indeed, on July 20, 2000, the House of Representatives passed an amendment that would have prohibited the Clinton administration from proceeding with the regulation. The amendment, sponsored by Rep. Tom Davis (R-VA) and Rep. Jim Moran (D-VA), passed by a vote of 228-190.[74] In addition, after the regulation became final, the Chamber and other business groups filed a lawsuit to block it from taking effect.[75] The Bush administration ultimately repealed the rule, rendering the lawsuit moot.[76]

The Obama administration's Executive Order resurrects all of the problems inherent in the Clinton administration's blacklisting regulation, and adds more. In light of insurmountable obstacles to the Executive Order's implementation and the unnecessary burdens that the Order imposes, it must be withdrawn. If not, the Subcommittees should be opposed to this administrative overreach. The President does not have authority to alter the enforcement schemes that Congress has created or to restrict employers' rights under the FAA. For that reason alone, the Subcommittees should do everything in their power to block the Administration from proceeding with this Executive Order.

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[74] *See* 106th Cong., 2nd Sess. Roll Call No. 423 and 146 Cong. Rec. H6672-84 (daily ed. July 20, 2000).

[75] *See* Mark Cutler, *Chamber, Business Groups File Lawsuit Challenging Contractor Compliance Rule*, DAILY LABOR REPORT (BNA) at A-2 (Dec. 28, 2000).

[76] 66 Fed. Reg. 66,984, 66,986 (Dec. 27, 2001).

Chairman WALBERG. Thank you.

Ms. Styles, we recognize you for your five minutes.

TESTIMONY OF MS. ANGELA STYLES, PARTNER, CROWELL & MORING, LLP, WASHINGTON, D.C.

Ms. STYLES. Thank you.

Chairman Walberg, Congresswoman Wilson, Congressman Polis, and members of both subcommittees. I appreciate the opportunity to appear before you today to discuss the *Fair Pay and Safe Workplaces Executive Order*. As a former administrator for federal procurement policy at OMB, as a government contracts practitioner, and as a taxpayer, I can tell you that I care a great deal about the effective and efficient functioning of our federal procurement system.

While I can't say that I was surprised that this executive order was issued, the concept of imposing greater sanctions on federal contractors for purportedly unacceptable labor practices has been around for at least two decades. I was, however, astonished when I started contemplating the practical effects of how this administration planned to go about subjectively sanctioning companies for actual and alleged labor violations.

The potential negative impact of this executive order cannot be overstated. The potential disruption and damage is particularly troubling because adequate mechanisms exist in our current procurement system to exclude companies with unacceptable labor practices.

To put it simply, if a pipe breaks at your house you hire a plumber to fix it; you don't go build a new house.

If this administration truly believes that companies with unacceptable labor practices are not being properly excluded from federal contracting, why aren't they using or bolstering the current, well-established, objective, and fair processes to do just that? Why instead are they building a new house; a new house with vast, complex, and highly subjective processes for sanctioning companies?

My written testimony goes into great detail about the processes being created and the ridiculous administrative burden it will place on our federal contracting officers and the new contemplated labor compliance advisors. Our federal contracting officers simply do not have the bandwidth to review extensive volumes of labor information, consult with labor compliance advisors, determine the appropriate remedial action, and consult with prime contractors regarding the labor practices of hundreds of thousands of subcontractors.

There are not enough hours in the day or enough employees in the federal government to implement this executive order as written. The federal government will be either unable to purchase essential goods and services or forced to create a system that unfairly targets contractors for special attention.

What I must highlight, however, is the devastating impact of this executive order on small businesses. While it should be relatively simple for a small business—and I think inexpensive—for a small business to collect and report on their own labor violations, it will be impossible and cost-prohibitive for a small business to try to collect information regarding their subcontractors and make responsibility determinations regarding their subcontractors.

The reality is that today small businesses rely on other businesses, including many, many large businesses, to perform substantial portions of their federal contracts. So they receive a federal contract and they award subcontracts to other businesses, including large businesses. So these small businesses that receive a prime contract will be faced with the overwhelming task of trying to collect and understand labor violations made by some of the largest businesses in the world and make a responsibility determination based upon that information.

So if, for example, a small business in Virginia wins a $5 million information technology contract at the Department of Defense but needs to subcontract $500,000 of that work to a multibillion dollar, multinational information technology company to actually successfully complete the work, the small business will be tasked with collecting and understanding all federal labor laws, the labor laws of all 50 states, as well as determining whether this large, multinational company has taken sufficient remedial steps to improve their labor practices. So even if the federal contracting officer and the labor compliance advisor or the Department of Labor answers the phone to help this small business make a decision, it is a monumental task that the small business will not be capable of performing.

Ultimately, small businesses will be left in the difficult decision of willfully failing to meet the terms and conditions of their prime contract with the federal government—requiring them to collect and assess this labor information—or they will not be able to do business as a prime contractor with the federal government.

As a bottom line, the articulated rationale for this E.O. fails objective scrutiny. The suspension and debarment process was created and operates with the purpose of fairly and objectively excluding companies that are not responsible from doing business with the federal government. Through the suspension and debarment process, the federal government makes a single, unified decision based upon all available evidence and affords contractors an appropriate level of due process.

This concludes my prepared remarks, but I am happy to answer any questions you may have. Thank you.

[The testimony of Ms. Styles follows:]

STATEMENT OF ANGELA B. STYLES

PARTNER, CROWELL & MORING LLP

BEFORE THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS JOINTLY WITH THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

FEBRUARY 26, 2015

CHAIRMAN WALBERG, CHAIRMAN ROE, CONGRESSWOMAN WILSON, CONGRESSMAN POLIS AND MEMBERS OF BOTH SUBCOMMITTEES, I appreciate the opportunity to appear before you today to discuss the impact of the Fair Pay and Safe Workplaces Executive Order issued on July 31, 2014. While the Administration has not promulgated interim or proposed rules to implement the Executive Order ("EO"), the potential negative impact of this EO cannot be overstated. As the former Administrator for Federal Procurement Policy at the Office of Management and Budget, I can tell you with a high degree of certainty, that this EO will: (1) grind essential federal purchases to a standstill, (2) alter the current legal relationship between prime contractors and subcontractors, (3) illegally and unfairly exclude responsible companies from doing business with the federal government, (4) devastate small businesses, and (5) substantially increase the government's costs of buying goods and services. The potential disruption and damage is particularly troubling because adequate mechanisms already exist in our current procurement system to exclude companies with unacceptable labor practices.

Unnecessary Bureaucratic Processes Created by the Executive Order

The EO creates vast new bureaucratic processes for contractors, subcontractors, and federal contracting officers to ensure that "parties who contract with the Federal government . . .

understand and comply with labor laws." The EO is grounded in an assertion that "[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government." While this statement may be true, it does not follow (as postulated by the EO), that creating extensive bureaucratic processes will actually increase understanding of or compliance with labor laws, all of which already provide remedial mechanisms crafted by Congress and the Executive Branch that penalize and should deter non-compliance. Indeed, there is little doubt that the high costs of this EO to contractors, subcontractors, the government, and the taxpayer far outweigh the potential benefit of increased productivity and the timely, predictable, and satisfactory delivery of goods and services to the federal government that might be achieved by a greater level of understanding and compliance with labor laws.

Specifically, this EO creates a time-consuming process for prime contractors and the federal government that requires the following seven new steps be taken prior to each contract award exceeding $500,000:

* Prime Contractor Reporting: the prime contractor must report actual and potential[1] labor violations at the federal and state level from the past three years
* Contracting Officer Review: the contracting officer must review the actual and potential labor violations submitted by the prime contractor
* Labor Compliance Advisor Review: the labor compliance advisor must review the actual and potential labor violations submitted by the prime contractor

[1] This testimony refers to "potential" labor law violations because the EO requires reporting of all "administrative merits determinations" without defining that phrase. Thus, it is unclear whether certain determinations, including a decision by the General Counsel's office of the National Labor Relations Board to issue complaint following its investigation of an unfair labor practice charge, constitute an "administrative merits determination," or whether only a subsequent decision issued by an administrative law judge is sufficient to trigger the reporting requirement.

* Consultation with Enforcement Authorities: the labor compliance advisor must consult with enforcement authorities at the federal and state level to determine "whether agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters."

* Consultation by Contracting Officer: the contracting officer must consult with the labor compliance officer subsequent to the labor compliance advisor's consultation with federal and state enforcement authorities

* Responsibility Determination: the contracting officer must determine whether the prime contractor is a "responsible source that has a satisfactory record of integrity and business ethics . . . ."

The EO requires all seven steps for each contract award at each federal agency, even when separate awards are being made to the same company. So, if Company X and the Department of Veterans Affairs go through all seven steps to execute a $1 million contract on Thursday, February 26th, the Department of Defense would have to go through the same seven steps to execute a different $1 million contract with Company X on Friday, February 27th. Each determination of responsibility must be made based on the current award decision being considered by each contracting officer, not a prior award. Considering that in fiscal year 2014, the U.S. government executed 99,822 different contract actions over $500,000, adding these seven steps to almost 100,000 contract actions each year while assuming the government contracting process will not grind to a halt borders on the irrational.[2]

As though the new process and information required prior to contract award for almost 100,000 actions is somehow an insufficient burden, the EO requires that virtually the same process be repeated every six months after prime contract award:

[2] Source data: www.usaspending.gov. Because the EO is unclear regarding the application of the requirements to task and delivery orders under existing long term contracts, this testimony has assumed that the EO will be applicable to all new contract actions exceeding $500,000. It is conceivable that the regulations could interpret the EO to apply only to new contracts and not apply to new awards of task or delivery orders.

* Prime Contractor Reporting: prime contractor must report actual and potential labor violations at the federal and state level every six months

* Contracting Officer Review: the contracting officer must review actual and potential labor violations submitted by the prime contractor and "similar" information obtained through other sources every six months

* Consultation by Contracting Officer: the contracting officer must consult with the labor compliance officer to determine if "action is necessary" every six months

* Action by Contracting Officer: After reviewing the prime contractor's submission every six months and reviewing similar information obtained from other sources and consulting with the labor compliance advisor, the contracting officer must decide whether "agreements requiring appropriate remedial measures, compliance assistance" or contract termination are necessary

Again, the EO requires these actions for each contract held by each prime contractor every six months. If one contractor has 100 different contracts at ten different agencies, the actual and potential labor violations will need to be considered individually, 100 different times by each contracting officer on each contract for the same company.

But the new burdens on the prime contractors and federal contracting officers imposed by the EO do not end there. After contract award, the prime contractor must take the following steps with proposed subcontractors to ensure compliance with state and federal labor laws:

* Subcontractor Reporting: Each prime contractor must require each subcontractor with a potential subcontract value exceeding $500,000 to report actual and potential labor violations at the federal and state level prior to subcontract award.

* Determination of Responsibility: Prior to the award of a subcontract exceeding 500,000, the prime contractor must review the information on actual and potential labor violations at the state and federal level and determine "whether the subcontractor is a responsible source that has a satisfactory record of integrity and business ethics".

The EO assures prime contractors that a contracting officer, labor compliance advisor, the Department of Labor, and relevant enforcement agencies "shall be available, as appropriate, for consultation with a [prime] contractor to assist in evaluating the information on labor compliance

submitted by a subcontractor." Adding more to the burden and similar to post-award prime contract reporting, every six months during contract performance, the prime contractor must require the subcontractor to update the information reported on actual and potential violations of labor law. With this subcontractor information in hand, every six months, the prime contractor must determine whether "action is necessary" against the subcontractor on each subcontract. According to the EO, action by the prime contractor could include requiring appropriate "remedial measures" or "compliance assistance" for the subcontractor. And once again, the EO promises that the contracting officer, the labor compliance advisor, and the Department of Labor will be "available" to assist the contracting officer in deciding what action against the subcontractor is appropriate.

Federal Contracting Would Grind to a Halt

Based upon over two decades of experience in federal procurement, inside and outside the government, I have little doubt that if the EO is implemented as written, purchases by the federal government will grind to a halt. Whether it is the purchase of equipment necessary for our warfighter, getting checks out the door to our senior citizens, or ensuring the safety of our food, none of it gets done without federal contractors. Our federal contracting officers do not have the bandwidth to review extensive volumes of labor information, consult with the labor compliance advisors, determine appropriate remedial action, and consult with prime contractors regarding the labor practices of hundreds of thousands of subcontractors. And I reiterate – there is already a whole body of labor law, and labor law remedies, designed by Congress and the Executive Branch to ensure labor law compliance, so there is no sensible reason to introduce this duplicative and inefficient bureaucracy.

If the burden on contracting officers seems overwhelming, consider the burden on the newly created labor compliance advisor. The current understanding is that each federal agency, except the Department of Defense, would have one labor compliance advisor. So for example, in fiscal year 2014, the labor compliance advisor at the Department of Veterans Affairs would have been responsible for reviewing actual and potential labor violations, consulting with relevant enforcement authorities, and consulting with the contracting officer for the 4,751 contract actions that were executed in 2014. The same labor compliance advisor at the Department of Veterans Affairs would also have to be available to assist prime contractors with considering actual and potential labor violations of thousands of subcontractors. The EO also calls out the following additional duties assigned to each labor compliance advisor:

* Meet quarterly with the Deputy Secretary, Deputy Administrator
* Work with the acquisition workforce, agency officials, and agency contractors to promote greater awareness and understanding of labor law requirements, including recordkeeping, reporting, and notice requirements, as well as best practices for obtaining compliance with these requirements
* Coordinate assistance for agency contractors seeking help in addressing and preventing labor violations
* Provide assistance to contracting officers regarding appropriate actions to be taken in response to violations identified prior to or after contracts are awarded, and address complaints in a timely manner
* Consult with the agency's Chief Acquisition Officer and Senior Procurement Executive, and the Department of Labor as necessary, in the development of regulations, policies, and guidance addressing labor law compliance by contractors and subcontractors
* Make recommendations to the agency to strengthen agency management of contractor compliance with labor laws
* Publicly report, on an annual basis, a summary of agency actions taken to promote greater labor compliance, including the agency's response pursuant to this order to serious, repeated, willful, or pervasive violations of the requirements of the labor laws

* Participate in the interagency meetings regularly convened by the Secretary of Labor pursuant to section 4(b)(iv) of this order

How is it possible for one labor compliance advisor to perform all these functions for over 4,500 contract actions, hundreds of contractors, and thousands of subcontractors? How could the labor compliance advisor do anything but create a process for reviewing *some*, but not all of the contract actions? How could that be done fairly and objectively without targeting particular companies?

But let's consider a more difficult labor compliance advisor position. In fiscal year 2014, the Department of Defense executed 61,528 contract actions over $500,000. Assuming the Department of Defense hires five labor compliance advisors and assuming these five labor compliance advisors work 40 hours/week for 50 weeks of the year, they will have a total of 10,000 hours to commit to over 60,000 contract actions. The Department of Defense labor compliance advisor will have less than 10 minutes per prime contract action to review the actual and potential labor violations, consult with relevant enforcement authorities, and consult with the contracting officer, not to mention the time required for the hundreds of thousands of subcontractors. And where will the labor compliance advisors find the time for the recurring six month reviews?

Simply put, there are not enough hours in the day or employees in the federal government to implement this EO as written. If an attempt is made to implement this EO, federal purchases will either grind to a halt, or a system will have to be created to pick and choose which federal contractors need "special attention" by labor compliance advisors. As contemplated, the federal government will either be unable to purchase essential goods and services or be forced to create a system that unfairly targets contractors for special attention to their labor practices. And all of

this is purportedly driven by a belief that this new bureaucracy will lead to a greater level of understanding and compliance with labor laws by federal contractors and subcontractors and will result in increased productivity and the timely, predictable, and satisfactory delivery of goods and services to the federal government.

The Current System Has Effective Remedies for Unsatisfactory Labor Records

A significant and wholly unanswered question, is why this process bureaucracy is being created when the current system has more than adequate remedies to prevent companies with unsatisfactory labor records from being awarded federal contracts. Indeed, the federal government has a robust system for determining whether companies and individuals should be excluded from federal contracting. 48 C.F.R. Part 9. The suspension and debarment official within each federal agency has broad discretion to exclude a company from federal contracting based upon evidence of any "cause so serious or compelling a nature that it affects the present responsibility of a Government contractor." 48 C.F.R. 9.407-2(c); 9-406-2(c). A federal contractor can also be excluded based upon a preponderance of evidence of (1) a "history of failure to perform, or of unsatisfactory performance of, one or more contracts" or (2) "willful failure to perform in accordance with the terms of one or more contracts". 48 C.F.R. 9.406-2(b)(1)(i). These exclusion remedies are more than sufficient to root out companies with unacceptable labor practices. If failure to comply with labor laws actually affects performance, the suspension and debarment official can debar the company for an unsatisfactory record of performance. If the contractor's labor record is not bad enough to affect performance, but raises questions of present responsibility, the suspension and debarment officials have broad discretion to suspend or debar a contractor for issues of business integrity that could affect contract performance. Indeed, it is difficult to understand the difference between an individual

contracting officer making a determination under the EO that a company is a "responsible source that has a satisfactory record of integrity and business ethics . . . ." on an individual contract basis and an agency suspension and debarment official making a determination of the "present responsibility" of a contractor. The primary distinction being that the suspension and debarment official will be making one decision for the entire federal government using a well-established process with significant due process protections in place for contractors.

With a robust suspension and debarment system that includes the necessary elements of due process, including a true opportunity to be heard before being excluded from federal procurements, why does the EO propose a painstaking contract-by-contract analysis of each prime contractor and subcontractor's labor practices by a contracting officer with a repeat every single six months? How could it not be better to approach this issue through the current suspension and debarment system, a system that allows for the thorough and complete examination of the present responsibility of the Company for the entire federal government? The suspension and debarment process allows for a complete review of a prime contractor or subcontractor's labor practices in a fair and impartial manner. With such a robust system in place, it makes no sense to create a new bureaucracy to review these issues on a contract-by-contract basis with the possibility of astoundingly inconsistent decisions by different agencies and different contracting officers.

The system proposed by the EO can only result in either: (1) overlapping and inconsistent decisions to exclude companies, or (2) the *de facto* debarment of federal contractors and subcontractors. But let's take an example to show the crippling and potentially illegal effects of one contracting officer's decision not to award to a contractor a single contract action. If, for example, a contracting officer at the Department of Defense decides that a particular contractor

should not be awarded a contract based upon labor compliance issues, that contracting officer could logically try to reduce the crushing workload by sharing the results of his review of labor practices with another contracting officer for the same contractor on a different contract action. When that second contracting officer uses the first contracting officer's determination and work product to decide not award to the contractor, the federal government has illegally and improperly effectuated a *de facto* debarment of the contractor from federal contracting without due process. As the United States Court of Appeals for the District of Columbia Circuit held, for each contract award, due process requires that the contractor be "notified of the specific charges concerning the contractor's lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer . . . that the allegations are without merit" before being denied a contract award. *Old Dominion Dairy Prods. Inc. v. Sec'y of Def.*, 631 F.2d 953,968 (D.C. Cir. 1980). In our example, the second contracting officer has failed to afford the company due process rights to challenge the finding that the company lacks integrity to be awarded the second contract. Indeed, the first contracting officer appears to have taken on the role of a suspension and debarment official, deciding for the entire federal government that a particular company lacks the integrity required to do business with the entire federal government.

The current regulations and case law require that responsibility decisions affecting more than one contract action be made by the properly designated agency suspension and debarment official. The regulations and case law require a single decision-maker to ensure due process and avoid inconsistent and overlapping decisions. However, under this EO, without the illegal and improper sharing of contractor labor practice decisions among contracting officers, labor compliance advisors, and agencies, it is hard to imagine how there will not be multiple and inconsistent decisions about each contractor's labor compliance practice. It is even harder to

imagine when prime contractors are also required to make a present responsibility decision regarding subcontractors -- a concept that seems to wholly ignore the practical realities of federal contracting -- that all large prime contractors also serve as subcontractors to many other companies on different federal procurements. With the existing and robust suspension and debarment process in the capable hands of objective agency officials that make decisions about the present responsibility of companies for the entire federal government with proper due process, it is impossible to understand why the EO proposes to have contracting officers making decisions on a contract-by-contract basis.

The EO Fundamentally Alters the Prime Contractor and Subcontractor Relationship

The EO fails to appreciate or understand the current arms-length nature of the contractual relationship between federal prime contractors and subcontractors. In order to ensure that prime contractors are getting the best products and services for the lowest price from subcontractors, current federal statutes and regulations generally require real competition and true arms-length negotiation. Asking prime contractors to meddle in how other companies resolve, settle, and mediate labor issues is a recipe for trouble. What is the prime contractor's potential liability if the prime contractor determines that a subcontractor is not responsible, but a federal agency considering that same subcontractor for a prime contract opportunity considers the company responsible? What if one prime contractor determines that a subcontractor is not responsible but all the others find the contractor responsible? These unanswered (and potentially unanswerable) questions create tremendous uncertainty in the prime contractor relationship with subcontractors. With prime contractors required to make responsibility decisions regarding subcontractor relationships, prime contractors will need to develop mechanisms to reduce their risk of

increased liability. Uncertainty and potential increased risk is normally handled in the free market through increased prices. These increased prices will ultimately be passed along to the agencies and the taxpayers.

Another problematic scenario may result from the requirement that subcontractors disclose their labor compliance to prime contractors. Company A is a prime contractor, and requires Company B to disclose its labor law compliance, in accordance with the EO, in order to bid on a contract. However, elsewhere in the Federal (or commercial) marketplace, Company A and Company B are competitors. Is Company B now disadvantaged with respect to new opportunities, because it has turned over this information to Company A?

Substantial Price Increases/Reduced Competition

Every new reporting requirement and every new process step added to the federal procurement process increases the price of goods and services to the federal government. To implement this EO, contractors will have to create new systems for collecting and reporting of actual and potential labor violations from the state and federal level. Additional personnel will have to be assigned to collect and organize data as well as negotiate with the labor compliance advisor and the contracting officer. There is a price to new reporting and new personnel. That price will be passed onto the government and ultimately the taxpayer. If the cost is too high, many commercial companies will stop doing business with the federal government or simply refuse to do business in the first place. The reduction in the number of companies competing for federal business will also increase prices. The fewer the number of competitors, the less the competition, the higher the prices.

Impact on Small Businesses

The devastating impact of this EO on small businesses cannot be underestimated. While it should be relatively simple and inexpensive for small businesses to collect and report their own labor violations, it will be impossible and cost prohibitive for small businesses to try to collect information regarding their subcontractors and make responsibility determinations related to subcontractors. Because many small businesses rely on other businesses (including large businesses) to perform substantial portions of their federal contracts, small businesses will be faced with the overwhelming task of trying to collect and understand labor violations made by some of the largest businesses in the world and then make a responsibility determination based upon that information. If for example, a small business in Virginia wins a $5 million information technology contract at the Department of Defense, but needs to subcontract $500,000 to a multi-billion dollar/multi-national information technology company to successfully complete the work, the small business will be tasked with collecting and understanding all federal labor laws and the labor laws of all 50 states, as well as determining whether this large multi-national company has taken sufficient remedial steps to improve labor practices. Even if the federal contracting officer, labor compliance advisor, or the Department of Labor answers the phone to help this small business make a decision, it is a monumental task that the small business will not be capable of performing. Ultimately, small businesses will be left in the difficult decision of willfully failing to meet the prime contract requirements for them to collect and assess labor information from their large business subcontractors or simply not do business as a prime contractor.

Conclusion

The articulated rational for this EO fails objective scrutiny. The suspension and debarment process was created and operates with the purpose of fairly and objectively excluding companies that are not responsible from doing business with the federal government. Through the suspension and debarment process, the federal government makes a single unified decision based upon all the available evidence and affords contractors an appropriate level of due process. This EO is either throwing due process out the door or creating a monstrous alternative to determining the present responsibility of contractors and subcontracts that can only result in chaotic and inconsistent results with significant litigation to sort out the liability. While the first sentence of the EO states that it is being issued "in order to promote economy and efficiency in procurement," its effect will be quite the opposite. Rather than create efficiency, the EO conflicts with the existing suspension and debarment process; introduces unnecessary, additional, and duplicative remedies for labor law violations already in place to ensure labor compliance; and creates the chilling specter of an enforcement system in which labor compliance advisors "choose" which companies need special attention.

This concludes my prepared remarks. I am happy to answer any questions you may have.

Chairman WALBERG. Ms. Styles, thank you.

Ms. Walter, it is now your time for five minutes of testimony. Thank you.

TESTIMONY OF MS. KARLA WALTER, ASSOCIATE DIRECTOR, AMERICAN WORKER PROJECT, CENTER FOR AMERICAN PROGRESS, WASHINGTON, D.C.

Ms. WALTER. Thank you.

Thank you, Chairman Walberg, Ranking Members Wilson and Polis, for this opportunity to present in support of the *Fair Pay and Safe Workplaces Executive Order*. I would also like to thank the workers who may be personally affected by the executive order for being here today.

My name is Karla Walter. I am associate director of the American Worker Project at the Center for American Progress Action Fund.

In my testimony today I will make three main points. First, far too often companies with long and egregious records of violating workplace laws continue to receive federal contracts. This not only harms workers, but also taxpayers and law-abiding businesses.

Second, the contractor review process is supposed to prevent this from happening by ensuring that only responsible companies receive federal contracts, but the system is broken. Third, President Obama's *Fair Pay and Safe Workplaces Executive Order* strives to help fix this broken system and ensure that law-breaking contractors come into compliance.

The federal government spends hundreds of billions of dollars each year contracting out everything from janitorial services to the design and manufacture of sophisticated weapon systems. Indeed, one in five American workers are actually employed by a company that contracts with the government.

The government is supposed to contract only with companies that have a satisfactory record of performance, integrity, and business ethics. But the contracting system does not effectively review the responsibility records of companies before awarding contracts, nor does it adequately impose conditions that encourage them to reform their practices.

Instead, the federal government all too often awards contracts to workplace violators with no strings attached. As a result, contractors that violate workplace laws have little incentive to improve their practices.

For example, a 2013 report by the Senate HELP Committee found that government contractors are often among the worst violators of workplace laws. Nearly 30 percent of top violations were received by companies that continued to receive government contracts.

Workers at these companies were shortchanged by $82 million, and at least 42 people died from workplace accidents at these companies. The victims ranged from a 46-year-old father of four who was killed while trying to clear a clothes jam in an industrial dryer, to 13 workers killed at a sugar refinery explosion sparked by combustible dust, to workers at two separate companies killed in oil refinery explosions.

When governments continue to contract with these law-breaking companies, it also frequently results in poor contract performance, wasting taxpayer dollars, and delivering low-quality services. Analysis from my organization shows that one in four companies that committed the worst workplace violations and later received federal contracts had significant performance problems. These ranged from contractors submitting fraudulent billing statements, to cost overruns and scheduling delays during the development of major weapons systems, to contractors falsifying firearm safety test results for courthouse security guards, to an explosion in the Gulf of Mexico that spilled millions of barrels of oil.

Finally, the current system puts law-abiding companies that respect their workers at a competitive disadvantage against bad actors that lower costs by paying below what they are legally required and cutting corners in workplace safety.

The federal government could have prevented many of these problems and promoted an efficient procurement process by reviewing companies' records of workplace violations before awarding a government contract. Unfortunately, the existing tools to ensure that this actually happens are inadequate. The database tracking contractor responsibility fails to include many serious violations, enforcement agencies provide no analyses of contractors' legal records, and contracting officers receive little guidance from existing regulations on how to evaluate records.

The executive order strives to ensure that contractors' records of workplace violations will be taken into account in determining whether or not they have a satisfactory record. It aims to create a fair, efficient, and consistent process by which the federal government can ensure all federal contractors are responsible and that law-breakers come into compliance.

The order is informed by best practices from the state and local governments and, in limited instances, federal agencies. Even in the private sector, it is becoming increasingly common for companies to factor in a bidder's record of safety in contracting decisions.

President Obama's order strives to ensure that companies that respect their workers are not put at a competitive disadvantage compared to law-breaking companies. Indeed, that is why six contractor associations are submitting for the record today their joint statement in support of the order.

While opponents have argued that these sorts of policies can bar or even blacklist companies with minor violations from receiving any federal contracts, improved responsibility guidance and a thorough investigation process promises to allow the government to identify only persistent violators and provide them an opportunity to clean up their acts. Moreover, the administration has indicated that this new system will simply require law-abiding companies to check a box to certify legal compliance, a process similar to how firms currently report on tax delinquency and contract fraud.

States and localities have found that adopting these laws to raise workplace standards actually has increased competition among contractors. For example, after Maryland implemented a contractor living standard, the average number of bids for contracts in the state increased by 27 percent.

Congress has the opportunity to support implementation of the order and thereby strive to ensure that companies with egregious records of violating workplace laws come into compliance. This will make a difference for millions of working Americans, ensuring that law-abiding companies can compete on an even playing field, and prevent the waste of taxpayer dollars.

Thank you.

[The testimony of Ms. Walter follows:]

Testimony before the Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor and Pensions of the U.S. House Education and the Workforce Committee regarding President Obama's Fair Pay and Safe Workplaces Executive Order

Karla Walter
Associate Director of the American Worker Project,
Center for American Progress Action Fund

February 26, 2015

Chairmen Walberg and Roe, Ranking Members Wilson and Polis, thank you for this opportunity to present testimony in support of President Obama's Fair Pay and Safe Workplaces Executive Order.

My name is Karla Walter. I am the Associate Director of the American Worker Project at the Center for American Progress Action Fund. CAP Action is an independent, nonpartisan, and progressive education and advocacy organization dedicated to improving the lives of Americans through ideas and actions.

In my testimony today, I will make three main points:

First, far too often companies with long and egregious records of violating workplace laws continue to receive federal contracts. This not only harms workers, but also taxpayers, and law-abiding businesses.

Second, the contractor review process is supposed to prevent this from happening by ensuring that only responsible companies receive federal contracts, but the current system is broken.

Third, President Obama's Fair Pay and Safe Workplaces Executive Order—informed by proven methods adopted by state governments, the private sector, and even federal government agencies in limited instances—strives to help fix the broken system and ensure that law-breaking contractors come into compliance before they are able to receive new contracts.

Law-breaking companies continue to receive contracts

The federal government spends hundreds of billions of dollars each year contracting out everything from janitorial services to the design and manufacture of sophisticated weapons systems. More than 1 in 5 American workers are employed by a firm that contracts with the federal government, according to the U.S. Department of Labor.[1]

Current regulations require that the government only contract with companies that have a satisfactory record of performance, integrity, and business ethics.[2] But the contracting system does not effectively review the responsibility records of companies before awarding contracts, nor does it adequately impose conditions on violators that encourage them to reform their practices.[3]

Instead, the federal government all too often awards contracts to workplace law violators with no strings attached. As a result, contractors that violate wage and workplace safety laws have little incentive to improve their practices. For example, a 2013 report by the Majority Committee Staff of the Senate Health, Education, Labor and Pensions Committee found that government contractors are often among the worst violators of workplace laws.

The report reviewed the 100 largest penalties and assessments for violations of both workplace wage and health and safety laws between fiscal years 2007 and 2012, finding that nearly 30 percent of the top violators were federal contractors that were still receiving contracts after having committed these violations. They were cited for 1,776 separate violations of these laws and paid $196 million in penalties and assessments during this time period.[4]

Workers at these companies were short-changed by $82 million, with violations that included not paying workers at a chemical weapons storage facility for time spent donning safety gear; failing to pay more than 25,000 call center workers for overtime; and misclassifying workers responsible for helping recently released prisoners re-enter society and find work.[5]

And at least 42 people have died from workplace accidents and injuries at these companies.[6] The victims range from a 46-year-old father of four killed while trying to clear a clothes jam in an industrial dryer; to 13 workers killed in a sugar refinery explosion sparked by combustible dust; to workers at two separate companies killed in oil refinery explosions.

This report echoes the findings and methodology of a 2010 report from the Government Accountability Office which scrutinized the companies levied with the 50 largest workplace health and safety penalties and those that received the 50 largest wage-theft assessments between fiscal year 2005 and fiscal year 2009.[7] Approximately one-third of all assessments were levied against companies that continued to receive federal contracts.

Moreover, research shows that when government continues to do business with these law-breaking companies it also frequently results in poor contract performance—wasting taxpayer dollars and delivering low-quality services to the government.

Analysis from the Center for American Progress Action Fund shows that 1 in 4 companies that committed the worst workplace violations—including wage and safety violations—and later received federal contracts had significant performance problems.[8] These problems ranged from contractors submitting fraudulent billing statements to the federal government; to cost overruns, performance problems, and schedule delays during the development of a major weapons system that cost taxpayers billions of dollars; to contractors falsifying firearms safety test results for courthouse security guards; to an oil rig explosion that spilled millions of barrels of oil into the Gulf of Mexico.[9]

While this CAP Action analysis represents new evidence that companies who flout workplace laws also often show disregard for taxpayer value, our evaluation was not the first to find this link. Thirty years ago, the U.S. Department of Housing and Urban Development found a "direct correlation between labor law violations and poor quality construction" on HUD projects, and found that these quality defects contributed to excessive maintenance costs.[10]

Similarly, a 2003 Fiscal Policy Institute survey of New York City construction contractors found that contractors with workplace law violations were more than five times more likely to receive a low performance rating than contractors with no workplace law violations.[11] And a 2008 CAP Action report found a correlation between a contractor's failure to adhere to basic labor standards and wasteful practices.[12]

Finally, the current system puts law-abiding companies that respect their workers at a competitive disadvantage against bad actors that lower costs by paying below what they are legally required and cutting corners in workplace safety.

In a 2014 McClatchy DC report Sandie Domando —the executive vice president of Concrete Plus —explained how law-breaking federal contractors harmed businesses and taxpayers alike:

> "With those government jobs, it's just not a fair playing field ... And that means that the tax money that we're paying in—that everybody's paying in— the government isn't spending it on the people that need it...They're giving it to companies that aren't following the rules."[13]

The Broken Responsibility Review System

The federal government could have prevented many of these problems by reviewing companies' records of workplace violations before awarding a government contract and ensuring that companies with persistent or egregious violations cleaned up their acts before receiving any new contracts.

A more thorough responsibility review is supposed to occur—the Federal Acquisition Regulations require that contractors have a satisfactory record of performance, integrity, and business ethics, in order to ensure that the government only does business with responsible companies with good performance records. [14]

The purpose of a responsibility determination is not to penalize federal contractors, but to promote an efficient procurement process by ensuring that the government only deals with companies that have a good track record of legal compliance. In order to do so, the Federal Property and Administrative Services Act of 1949 and the Armed Services Procurement Act of 1947 authorize the President to create processes to ensure that federal contractors are responsible. [15]

Unfortunately, the existing tools to ensure that this actually happens are woefully inadequate. The federal database tracking contractor responsibility—the Federal Awardee Performance and

Integrity Information System, or FAPIIS—includes only the legal violations committed by a company while working on federal contracts or grants, but not information on these contractors' private-sector compliance history.[16] What's more, most workplace violations are excluded due to high thresholds for reimbursement, restitution, and damages.[17] This means that federal contracting officers may miss more than half the story about a company's record of compliance.

Moreover, enforcement agencies provide no analyses of contractors' legal records, and contracting officers receive no guidance from existing regulations on how to evaluate bidders' responsibility records. A contracting officer would have to sift through millions of compliance records—evaluating everything from companies' tax and environmental violations to workplace safety and pay records—and use their own judgment about whether past violations are enough to find a contractor not responsible.[18] As a result, FAPIIS has not formed the basis of rigorous responsibility review.

Fixing the broken system

The Fair Pay and Safe Workplace Executive Order, signed by President Obama on July 31, 2014, simply strives to ensure that a contractor's record of workplace law violations will be taken into account in determining if the contractor has "a satisfactory record of integrity and business ethics."[19] It aims to create a fair, efficient, and consistent process by which the federal government can help ensure all federal contractors are responsible and respect their workers.

In particular, the order will:

- Require federal contractors to disclose their record of compliance with workplace laws
- Ensure that law-breaking companies clean up their acts by empowering federal agencies to consult with the U.S. Department of Labor to investigate and remediate ongoing problems with their contractors

The order is informed by best practices from state and local governments, private-sector companies, and, in limited instances, federal government agencies that have adopted thorough responsibility screenings to review a potential contractor's workplace record before entering into a contract. These laws and policies—which, in some cases, have been on the books for more than a decade—have helped improve contract performance and protect workers. Moreover, these laws help ensure that law-abiding companies can compete on a fair playing field for government contracts.

Many states—including California, Connecticut, Illinois, Massachusetts, Minnesota, and New York, as well as the District of Columbia and other major cities, including Los Angeles and New York City—have adopted responsible bidder-screening programs.[20] They have adopted these laws to improve the quality of their contractor pools and do a better job of identifying companies with long track records of committing fraud, wasting taxpayer funds, violating workplace laws and other important regulatory protections, as well as those lacking the proper experience and licensure.

For example, Massachusetts has enacted a prequalification process for contractors bidding on state and local public-works projects, which is mandatory for projects of more than $10 million and optional for smaller projects.[21] Prequalification is based upon various factors, including a review of the firm's safety record and compliance with workplace laws.[22]

New York law also requires state agencies to make a determination of responsibility before awarding a contract and encourages the use of use tools such as vendor certification and ongoing monitoring to correct problems found in responsibility reviews.[23] New York State Comptroller Thomas DiNapoli approved a $4.7 million painting contract last year, but only after the state transportation agency appointed an independent integrity monitor to ensure that the contractor complies with wage laws. The comptroller—who reviews contracts for state agencies—had previously rejected the contractor due to an apparent connection to companies that were debarred for wage violations.[24]

Finally, Minnesota passed legislation just last year that requires state and local governments to conduct a thorough review of a proposed contractor's record on publicly-owned or financed construction projects on contracts valued at more than $50,000. The process includes a review of a company's safety record and compliance with wage laws.[25]

Some federal contracting programs also use a thorough responsibility review process in order to improve contract performance. The U.S. Department of Defense conducts a pre-award safety survey—which includes a review of safety history and accident experience—on all department ammunition and explosives contracts.[26] The U.S. Chemical Safety Board—an independent federal watchdog agency—issued a recommendation in 2013 that the government establish similar safety review requirements for all federal contracts after an explosion killed five workers at a company contracted by the U.S. Department of the Treasury to dispose of fireworks.[27]

Additionally, the Recovery Operations Center of the Recovery Accountability and Transparency Board provided risk assessments—including a review of past convictions and other government enforcement data—on companies that bid for contracts funded through the American Recovery and Reinvestment Act of 2009.[28] According to the board's executive director:

> The Board is not telling agencies what to do. When we issue an alert, we are throwing up a caution flag—take care, we are saying, before handing out that contract. Bottom line: [The program] can be used throughout the lifecycle of an award and will reduce fraud and improper payments, saving taxpayers money.[29]

Even in the private sector, it is becoming increasingly common for companies to factor in a bidder's workplace safety record in contracting decisions. A number of industry associations, including the Construction Users Roundtable, the American National Standards Institute, and FM Global recommend evaluating the safety record of companies that are bidding for contracts.[30]

Opponents have argued that the new system will create an undue burden on private companies that will increase compliance costs.[31] However, the administration has indicated that the new system will simply require law-abiding companies to check a box to certify legal compliance, a

similar process for how these firms currently report on a number of responsibility matters, including tax delinquency and contract fraud. An online database can help improve public accountability, and guidance from the Department of Labor aims to provide consistency across all branches of government.

Only contractors that have shortchanged their workers and cut corners on workplace safety should be subject to a heightened review process and any potential costs associated with complying with current workplace laws. The government can encourage these companies to clean up their acts and ensure an efficient contract award process by creating a way for companies to come forward in order to rectify ongoing problems before they bid on contracts.

Indeed, in developing draft regulations and guidance on the order, the administration has solicited input from various stakeholder groups—including business community representatives—to ensure that the new system is efficient and practicable for all parties.[32]

President Obama's order strives to ensure that companies that respect their workers are not put at a competitive disadvantage compared to bad actors that reduce costs by paying wages lower than required by law and cutting corners on workplace safety.

While opponents have argued that that these sorts of policies could bar or even "black list" companies with minor workplace violations from receiving any federal contracts, improved responsibility guidance and a thorough investigation process should allow the government to identify only persistent violators of workplace laws and provide them an opportunity to clean up their acts.

Efforts to protect workers employed by contractors and ensure law-abiding contractors are able to compete on an even playing field have increasingly received bipartisan support. Last year, the House of Representatives took an even more aggressive stance, adopting an amendment to the Transportation, Housing and Urban Development Appropriations Act to deny certain federal contracts to any company that committed certain violations of the Fair Labor Standards Act.[33]

States and localities have found that adopting laws to raise workplace standards among contractors actually increases competition among responsible companies, according to a report from the National Employment Law Project.[34] For example, after Maryland implemented a contractor living standard, the average number of bids for contracts in the state increased by 27 percent—from 3.7 bidders to 4.7 bidders per contract. Nearly half of contracting companies interviewed by the state of Maryland said that the new standards encouraged them to bid on contracts because it leveled the playing field.[35]

Also, high-road businesses that respect their workers and obey workplace laws reported that they are more likely to bid on District of Columbia contracts since it enacted an enhanced responsibility review process in 2010.[36] According to Allen Sander, chief operating officer of Olympus Building Services Inc.:

- Too often, we are forced to compete against companies that lower costs by short-changing their workers out of wages that are legally owed to them. The District of

> Columbia's contractor responsibility requirements haven't made the contracting review process too burdensome. And now we are more likely to bid on contracts because we know that we are not at a competitive disadvantage against law-breaking companies.[37]

Conclusion

Congress has opportunity to support implementation of President Obama's Fair Pay and Safe Workplaces Executive Order and thereby strive to ensure companies with long and egregious records of violating workplace laws come into compliance before they are able to receive more government contracts. This will make a considerable difference for the more than 1 in 5 American workers employed by companies receiving federal contracts; ensure law-abiding companies compete on an even playing field; improve the quality of services provided to the government; and prevent waste of taxpayer dollars.

Endnotes

[1] Office of Federal Contract Compliance Programs, *Facts on Executive Order 11246- Affirmative Action*, (Department of Labor, January 2002), available at http://www.dol.gov/ofccp/regs/compliance/aa.htm

[2] General Services Administration, *Federal Acquisition Regulation*, (March 2005), available at: http://www.acquisition.gov/far/current/pdf/FAR.pdf

[3] Karla Walter and David Madland, "At Our Expense" (Washington: Center for American Progress, 2013), available at: https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/

[4] Majority Committee Staff of the Senate Health, Education, Labor, and Pensions Committee, "Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk," (December 2013), available at: http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf

[5] Ibid.

[6] Senator Tom Harkin, "How the Federal Contracting System Harms Workers and Taxpayers," PowerPoint Presentation, December 11, 2013.

[7] Government Accountability Office, "Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors" (2010), available at: http://www.gao.gov/products/GAO-10-1033

[8] Walter and Madland, "At Our Expense."

[9] Ibid.

[10] Office of Inspector General, U.S. Department of Housing and Urban Development, "Audit Report on Monitoring and Enforcing Labor Standards" (1983)

[11] Moshe Adler, "Prequalification of Contractors: The Importance of Responsible Contracting on Public Works Projects" (New York: Fiscal Policy Institute, 2003).

[12] David Madland and Michael Paarlberg, "Making Contracting Work for the United States: Government Spending Must Lead to Good Jobs" (Washington: Center for American Progress, 2008).

[13] Nicholas Nehamas, "For Florida Companies that Play by the Rules, Success is as Tough as Nails", *McClatchy D.C.*, September 14, 2014, available at: http://www.mcclatchydc.com/static/features/Contract-to-cheat/Florida-woman-learned-hard-lesson.html

[14] Office of Federal Contract Compliance Programs, *Federal Acquisition Regulation, Subpart 9.1- Responsible Prospective Contractors* (Department of Labor, 2014), available at: http://www.acquisition.gov/far/html/Subpart%209_1.html

[15] Kate M. Manuel, "Responsibility Determinations under the Federal Acquisition Regulation: Legal Standards and Procedures", (Congressional Research Service, 2013), available at: https://www.fas.org/sgp/crs/misc/R40633.pdf

[16] Contractors with current active federal awards with total value greater than $10,000,000 are required to self-report legal violations. The database also includes determinations entered by federal government personnel including: terminations for default, terminations for cause, terminations for material failure to comply,

nonresponsibility determinations, recipient not qualified determinations, defective pricing determinations, administrative agreements, and Department of Defense determinations of contractor fault.

[17] Contractors with current active federal awards with total value greater than $10,000,000 must report any administrative proceeding in which there was a finding of fault and liability that results in the payment of a monetary fine or penalty of $5,000 or more; or the payment of a reimbursement, restitution, or damages in excess of $100,000. However, penalties and reimbursements for workplace violations often fall below these thresholds and frequently do not include an admission of fault.

[18] Karla Walter and David Madland, "Taking the High Road: Next Steps for Cleaning Up Federal Contracting," (Center for American Progress Action Fund, August 2010), available at: https://www.americanprogressaction.org/issues/labor/news/2010/08/11/8275/taking-the-high-road/

[19] Office of Federal Contract Compliance Programs, *Federal Acquisition Regulation, Subpart 9.1- Responsible Prospective Contractors* (Department of Labor), available at: http://www.acquisition.gov/far/html/Subpart%209_1.html

[20] While, none of these state and local laws exactly mirror the statutory coverage or review processes included in the Fair Pay and Safe workplaces executive order, the policies similarly seek to uphold higher standards in contractor responsibility and do so by including a review of workplace standards. Karla Walter and David Madland, "Taking the High Road: Next Steps for Cleaning Up Federal Contracting;" Connecticut Department of Administrative Services, "Prequalification and Evaluation of Contractors", (March 2009), available at: http://www.inthepublicinterest.org/sites/default/files/Connecticut%20Prequal%20and%20Eval.pdf; *Illinois Public Act 097-0369,* HB 1375, General Assembly 97 (August 15, 2011), available at: http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=097-0369; *General Low, Port I, Title XXI, Chapter 149A, Section 8,* Massachusetts Legislature, available at: https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149a/Section8; *Minnesota Statute* HF 1984-4, Session 88 (May 9, 2014), available at: http://www.faircontracting.org/wp-content/uploads/2014/07/FINAL-version-of-HF-1984-for-Gov-signature.pdf; New York: Office of NY State Comptroller Thomas P. DiNapoli, "Vendor Responsibility" (last accessed February 2015), available at: http://www.osc.state.ny.us/vendrep/forms_vendor.htm; *Procurement Practices Reform Act of 2010,* Council of the District of Columbia, (2010), available at: http://ocp.dc.gov/sites/default/files/dc/sites/ocp/publication/attachments/PPRA.pdf; *Contractor Responsibility Progrom,* Los Angeles Ordinance 173677, (2000), available at: http://www.inthepublicinterest.org/sites/default/files/LA%20Contractor%20Responsibiliy%20Ordinance.pdf; and *NYC Administrative Code § 6-116.2* (2001), available at: http://www.nyc.gov/html/mocs/downloads/pdf/1_VENDEX_statute.pdf.

[21] Massachusetts Division of Capital Asset Management, "Guidelines of Prequalification of Federal Contractors and Subcontractors to Work on Public Building Construction Projects," (April 2008), available at: http://www.mass.gov/anf/docs/dcam/pubbldgconstr/prequal-guidelines-april-2008.pdf

[22] Ibid. Companies seeking prequalification are required to report on every legal proceeding, administrative proceeding and arbitration currently pending or concluded adversely against it which relate to the procurement or performance of any public or private work. In addition, companies are required to report on their workers' compensation experience modifier. These items are evaluated and scored as part of a company's total management experience score.

[23] New York State, "Vendor Responsibility Questionnaire, For-Profit Business Entity," (2013), available at: http://www.osc.state.ny.us/vendrep/documents/questionnaire/ac3290s.pdf; and New York State, "Best Practices Determining Vendor Responsibility," (April 2009), available at: http://www.ogs.ny.gov/procurecounc/pdfdoc/Bestpractice.pdf. New York's Vendor Responsibility Questionnaire requires bidders to report on whether they have been subject to an investigation, open or closed, for a civil or criminal investigation; received any serious or willful OSHA citation or Notification of Penalty; or had a government entity find a willful prevailing wage violation or other willful violation of New York State Labor Law. Each state agency is responsible for establishing a vendor responsibility review and determination process. However, the Office of the State Comptroller must also be satisfied that a proposed contractor is responsible.

[24] Office of NY State Comptroller Thomas P. DiNapoli, "DiNapoli Approves $4.7 Million State DOT Bridge Contract After Integrity Monitor Put in Place," Press release, May 27, 2014, available at: http://www.osc.state.ny.us/press/releases/may14/052714a.htm

[25] Minnesota House File 1984 (2014), available at https://www.revisor.mn.gov/bills/bill.php?f=HF1984&y=2014&ssn=0&b=house. Minnesota's responsible contractor requirements took effect on January 1, 2015. To be a responsible contractor, a contractor must verify that it is in compliance with a number of state and federal laws. For example, bidders must report on violations of state wage laws; findings by U.S. Department of Labor Wage and Hour Division ruled on by an administrative law judge or Administrative Review Board; and court findings that a company is liable for underpayment of wages or penalties for misrepresenting a construction worker as an independent contractor. Contractors that are not in compliance with any one of the minimum criteria or that make a false statement are ineligible to be awarded a contract.

[26] Department of Defense, *Contractors Safety Manual for Ammunition and Explosives,* (March 13, 2008).

[27] U.S. Chemical and Safety Hazard Investigation Board, 'Investigation Report: Donald Enterprises, Inc." (January 2013), available at: http://www.csb.gov/assets/1/19/DEI_Final_01172013.pdf; and Danielle Ivory, "Deadly Hawaii Fireworks Blast Tied to Contractors by U.S.," *Bloomberg Business,* January 7, 2013, available at: http://www.bloomberg.com/news/articles/2013-01-17/deadly-hawaii-fireworks-blast-tied-to-contractors-by-u-s-

[28] Government Accountability and Transparency Board, *Report and Recommendations to the President,* (December 2011), available at: http://www.whitehouse.gov/sites/default/files/gat_board_december_2011_report_and_recommendations.pdf

[29] Alice Lipowicz, "Agencies Get New IT Fraud Prevention Tool," *FCW,* February 7, 2012, available at: http://fcw.com/Articles/2012/02/07/Recovery-board-offers-new-fraud-prevention-IT-tool-to-federal-agencies.aspx?m=1

[30] Karla Walter and David Madland, "At Our Expense"

[31] Letter from Coalition to Department of Labor Secretary Thomas Perez, "Re: Concerns with the Fair Pay and Safe Workplaces Executive Order (E.O. 13673)," November 6, 2014, available at: http://www.pscouncil.org/PolicyIssues/LaborIssues/GeneralLaborIssues/Coalition_Letter_on_Fair_Pay_and_Safe_Workplaces_EO.aspx

[32] For example, on October 10, 2014, the White House hosted a listening session regarding the executive order with numerous business community representatives.

[33] *Transportation, Housing and Urban Development, and Related Agencies Appropriations Act*, H. Rept. 4745, 113 Cong. 1 sess. (Congress.gov), available at: https://www.congress.gov/bill/113th-congress/house-bill/4745

[34] Paul K. Sonn and Tsedeye Gebreselassie, "The Road to Responsible Contracting," (NELP, June 2009), available at: http://nelp.3cdn.net/985daceb6c3e450a10_pzm6brsaa.pdf

[35] Maryland Department of Legislative Services, "Impact of the Maryland Living Wage," (2008), available at: http://www.chamberactionnetwork.com/documents/LivingWage.pdf

[36] *Procurement Practices Reform Act of 2010,* Codification District of Columbia Official Code, 2001, available at: http://ocp.dc.gov/sites/default/files/dc/sites/ocp/publication/attachments/PPRA.pdf

[37] Allen Sander, chief operating officer of Olympus Building Services Inc., July 18, 2014, letter on file with the author.

Chairman WALBERG. Thank you.

And now we turn to Mr. Soloway for your five minutes of testimony.

TESTIMONY OF MR. STAN SOLOWAY, PRESIDENT AND CEO, PROFESSIONAL SERVICES COUNCIL, ARLINGTON, VA

Mr. SOLOWAY. Thank you, Mr. Chairman, members of the subcommittees. I appreciate the opportunity to be here.

In the interest of avoiding being overly redundant with my colleagues on the panel, I would like to just make a couple of core points to lead into the discussion and your questions as we go forward.

First, let me also mention my own personal involvement with this issue. The *Fair Pay and Safe Workplaces Executive Order* is actually the stepchild of a Clinton-era executive order called the Contractor Responsibility Rule, which was known in those days as the "blacklisting rule." I was the lead official at the Clinton administration Department of Defense dealing with the writing and development of that rule at the time.

And, as with this rule, that rule was poorly constructed, it was poorly thought out, and it was rushed through the system without any consideration of the unintended consequences it could create despite the fact that it was based on a perfectly reasonable and appropriate tenet. In fact, I would fully associate myself with the comments of everybody on the Committee who has spoken thus far, including Mr. Polis and others, who have talked about the need to avoid giving contracts to bad actors.

This executive order does not make policy in that regard. It is well-established in federal law and federal procurement practice that bad actors can be and should be denied federal contracts.

The real issue at stake here with regard to that particular point is the degree to which current information systems in the government adequately interface with each other and provide collective information to the parties that appropriately need it to make reasoned, expert decisions—particularly suspension and debarment officials and others. Instead of fixing the information system, this order creates a broad, sweeping regulatory regime that, as others have already said, raises significant questions of executability and of due process.

Second, the executive order and many of the reports and statistics already cited in this hearing, including the Senate HELP report, ignore the fact that a substantial if not majority of the cases involved and reported are tied directly to either the government's failure to appropriately exercise its responsibilities or the sheer complexity of implementing the *Service Contract Act*, the *Davis-Bacon Act*, and other prevailing wage laws.

This is not to suggest that we argue in favor of getting rid of them, but it is to suggest if you look at the record and you talk to officials in the Wage and Hour Division at DOL and elsewhere, they will fully acknowledge that it is absolutely routine for companies who are trying to do business under the rules established by Davis-Bacon and Service Contract Act to have violations, many of which are technical in nature, many of which involve the com-

plexity of trying to determine how to match a job to a given wage and benefits rate as prescribed by the Department of Labor.

And even in the reports that have come out of the Senate, something like half of the cases of violations of these laws resulted from the government's failure to include in the contract the appropriate clauses to tell the contractor, "You are subject to these particular laws." So this is a really complex implementation challenge on the—both government and contractor side, which I think this proposed executive order and many of the reports that deal with some of these issues tend to overlook dramatically.

Third, this executive order kind of upends a very important concept that Ms. Styles addressed a moment ago, or alluded to, and that is this whole concept of present responsibility.

Every institution experiences wrongdoing. I think we all agree with that. And often it is said that the best measure of an institution is how it responds to that wrongdoing and adjusts going forward.

This rule does not open up the door to that kind of a—it completely changes that. Allegations, settlements without finding of—on either party's side automatically considered violations that are to be considered.

What would you do if you were a government contractor? You wouldn't go to the trouble of trying to figure out all the details of every case on every—of every bidder that is coming in the door; you are going to just say, "I can't deal with this," and any allegation, any situation that raises any red flags, you are simply going to walk away.

That is the way the system will work because it is the safest way to protect yourself. That is fundamentally unfair.

Finally, just one comment with regard to some previous testimony—the idea that this is simply a checking of the box, like we do for tax responsibility. I would urge you to go back to the record of discussion and debate over tax—over the legislation that led to that simple box-checking, because the same issues were at stake there that are at stake here.

Fully adjudicated tax violations we all agreed to—not allegations, not tax liens that were not yet fully adjudicated. There was a whole process of defining what I was—what I would be certifying to if I checked that box.

That process has not been gone through with regard to this executive order.

[The testimony of Mr. Soloway follows:]

Statement of
Stan Soloway
President & CEO
Professional Services Council

"The Blacklisting Executive Order: Rewriting
Federal Labor Policies Through Executive Fiat"

Joint Hearing of the
Workforce Protections
&
Health, Employment, Labor, and Pensions
Subcommittees

House Committee on Education and the
Workforce

U.S. House of Representatives

February 26, 2015

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Introduction

Chairman Walberg, Chairman Roe, Ranking Member Polis, Ranking Member Wilson, and Members of the Subcommittees, thank you for the invitation to testify before you this morning on behalf of the Professional Services Council's nearly 400 member companies and their hundreds of thousands of employees across the nation.[1] The issue of today's hearing is an important one with a long history and its effects must be fully understood and considered before there should be any consideration of imposing its requirements on contractors.

Let me be clear that PSC supports the underlying intent of the Fair Pay and Safe Workplaces Executive Order that we are focusing on today.[2] Logically, it is unfair that contractors with repeated, willful, and pervasive violations of labor laws gain a competitive advantage over the vast majority of contractors that are acting diligently and responsibly to comply with a complex web of labor requirements. That said, we are strongly opposed to this Executive Order because it goes far beyond its stated intent and is unnecessarily excessive, largely unworkable and inexecutable. More specifically, the Executive Order will act as a de facto blacklisting of well-intentioned, ethical businesses, further restrict competition for contracts, create procurement delays, and add to the cost of doing business with the government. And despite its laudable intent, the Executive Order will also create significant new implementation and oversight costs for the government for what even the administration acknowledges is a relatively small problem. In simple terms, this Executive Order lacks crucial, fundamental characteristics of fairness, logic, and objectivity.

About the Executive Order

Executive Order 13673 (E.O.) seeks to ensure that only those contractors who abide by a myriad of federal and "equivalent" state labor laws are permitted to receive federal contracts.[3] The E.O. and its supporting materials state that the E.O. is necessary because of instances in which companies have failed to comply with existing laws related to

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[1] For 40 years, PSC has been the leading national trade association of the government technology and professional services industry. PSC's nearly 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states. See www.pscouncil.org.

[2] Executive Order 13673 issued on July 31, 2014; Fed Reg 45309, et seq, available at http://www.gpo.gov/fdsys/pkg/FR-2014-08-05/pdf/2014-18561.pdf,

[3] To date, there is no federal requirement that imposes a contractual obligation to comply with state laws. The E.O. will require the Department of Labor to determine when labor laws are "equivalent."

wage requirements, workplace safety, and employer anti-discrimination. However, the E.O. also recognizes that the "vast majority of federal contractors play by the rules,"[4] which itself raises serious questions about the necessity of such a sweeping and significant new compliance regime.

To achieve its intended goal, the E.O. would require that federal procurements for goods and services over $500,000 include a provision in the solicitation requiring every prospective contractor (offeror) to represent, to the best of the offeror's knowledge and belief, whether there have been any administrative merits determinations, arbitral award decisions, or civil judgments, as may be defined in yet-to-be-issued guidance—not rules—by the Department of Labor, rendered against the offeror within the preceding three year period, for violations of 14 enumerated federal labor laws and their equivalent state laws. Examples of the laws that would be covered by the E.O. include the Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), the National Labor Relations Act, the Davis-Bacon Act, and the Service Contract Act.

Based on the information received from offerors, government contracting officers must make a determination about each offeror's present responsibility, thus determining whether the offeror is suitable for a contract award.

If awarded the contract, the awardee must require all of its subcontractors to also disclose to the awardee any of its labor-related findings and the awardee must evaluate any disclosure by subcontractors and make a determination regarding whether their subcontractors are "presently responsible sources" with satisfactory records of integrity and business ethics.

The E.O. would also create a new function within each agency and require the appointment of a senior official to serve as the "Labor Compliance Advisor" (LCA). It tasks LCAs with assisting agency contracting officers with making decisions about contractors' compliance with labor laws and whether contractors are "presently responsible." The LCA is also to provide assistance to the agency suspension and debarment official when initiating suspension and debarment proceedings. Finally, the LCA is to assist prime contractors with making their decisions about their subcontractors' "present responsibility."

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[4] Fact Sheet: Fair Pay and Safe Workplaces Executive Order, available at http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order.

The E.O. directs the Department of Labor to provide certain definitions of key provisions and additional guidance regarding the implementation of the E.O. The E.O. also directs the FAR Council to develop a proposed rule to implement the E.O. However, the E.O. does not provide any specific timeline for action, although we are aware of the administration's desire to have it fully implemented by January 2016.

History

The Fair Pay and Safe Workplaces Executive Order is similar in several respects to previous initiatives under the Clinton administration. I am familiar with this history because, at that time, I was a deputy undersecretary of defense and served as the primary lead for DoD on those proposed rules. I can assure you that, even at that time, there was a great deal of concern across the administration about whether that proposed rule was fair or implementable and whether it would hinder the Defense Department's (or other agencies') ability to effectively partner with essential and "responsible" private sector entities. In my view, those concerns remain valid today, as well, particularly since this E.O. goes well beyond the prior version.

As you may know, building on a commitment from then-Vice President Gore in 1996, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in 2000 published a proposed rule called the "Contractor Responsibility Rule."[5] The driving force behind the proposal was actually a single case, albeit a significant one, involving a company with scores of labor violations. At stake was the core question of whether a company could be denied a federal contract solely on the basis of legal violations unrelated to its ability to perform on the contract. Many of us believed the concept of "present responsibility," a fundamental concept of federal acquisition law, clearly signaled that the answer to the question was "yes." However, others disagreed and the company was awarded additional work. As a result, as one of its last regulatory acts, the Clinton administration issued the final version of the "Contractor Responsibility Rule."[6] Then, as now, the intent was laudable. But then, as now, the rule was poorly thought-out, overly broad, and completely inexecutable. And, as you may also know, the final rule was rescinded by the Bush administration just a few weeks later.

Since then, however, the issue at the heart of that debate—the government's ability to deny a contract award on the basis of broad compliance with federal law—has largely

[5] 65 Fed Reg 40830, et seq, published on June 30, 2000, available at http://www.gpo.gov/fdsys/pkg/FR-2000-06-30/pdf/00-16266.pdf.
[6] 65 Fed Reg 80256, et seq, published on Dec. 20, 2000, available at http://www.gpo.gov/fdsys/pkg/FR-2000-12-20/pdf/00-32429.pdf.

been settled. Over the last decade, numerous cases, from Enron to British Petroleum, have repeatedly demonstrated the government's authority to deny contract awards to companies with documented, pervasive, and willful violations of law, even when those violations were entirely unrelated to the company's performance on a government contract. Nonetheless, the Fair Pay and Safe Workplaces E.O. shares many of the same attributes as its Clinton-era predecessor: it is poorly thought-out out and constructed, overly broad and of fundamentally questionable fairness. It is also unnecessary. There is no debate today about whether pervasive violations of law, including federal labor laws, can be used as the reason to deny future federal contracts to a company through suspension and debarment procedures. And there is no real debate as to whether the government already has at its disposal any number of tools to penalize bad actors.

Challenges

As I stated previously, the E.O. poses a number of implementation challenges that renders it unworkable. It would also create a number of unintended consequences, and most notably, is completely unnecessary. While we learn more about the adverse effects of the E.O. every day, there are many aspects that we will not know about until well into implementation. I hope we do not get to that point because this E.O. has too many undefined terms, too few objective standards, and too much potential for adversely affecting the federal procurement process.

The Executive Order is Unnecessary

There is no evidence of a widespread problem of pervasive, repeated or willful violations of labor laws by federal contractors. As the White House Fact Sheet accompanying the E.O. states, the vast majority of contractors play by the rules. That is not to say that there are not instances where contractors have violated labor laws. And some of these infractions may well have been intentional. But the fact is that the laws involved are so complex and challenging to execute that many companies, sometimes at the direction of the government itself, take actions that result in honest mistakes. Yet, each mistake is, technically, a violation of law and these honest, administrative errors make up the vast bulk of "violations." Beyond that, there are numerous existing mechanisms and processes available to federal agencies that are more suitable and less intrusive than the E.O. for dealing with those cases in which there has been nefarious intent.

First, contracting officers are already required to evaluate each offeror to determine whether it is a "responsible" contractors, and that evaluation is based on the totality of the contractor's performance history. FAR 9.104 states that such determination is to

include whether the contractor has a satisfactory record of integrity and business ethics. To assist contracting officers with making such determinations, contracting officers are required to review government maintained databases, including the former Excluded Parties List System (EPLS)—which lists all suspended or debarred contractors—and the Federal Awardee Performance Information and Integrity System (FAPIIS), which contains information about previous non-responsibility determinations, contract terminations, and any criminal, civil and administration agreements in which there was a finding or acknowledgement of fault by a contractor tied to the performance of a federal contract.

In addition, under FAR 9.4, which outlines the federal government's suspension and debarment structure, federal agencies have the authority to suspend or debar a contractor for a number of enumerated actions, including for "commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor." This catch-all provision provides the necessary authority for suspension and debarment action against a contractor for violations of, among other things, federal labor laws. This authority is also reiterated in several places on the DoL website, and specifically on DoL's published fact sheets outlining the penalties for contractor violations of the Service Contract Act.[7] In addition to the FAR suspension and debarment process, the Department of Labor has independent statutory authority to debar a contractor for significant federal labor law violations.

Examples of other existing remedies include criminal prosecutions, civil actions, substantial fines, liquidated damages, and contract terminations. Federal contractors know these actions are serious as each of them carries significant consequences. The E.O., however, fails to acknowledge that the existing remedial actions even exist, let alone are effective, and instead assumes that only stripping contractors of their contracts or denying them the ability to compete for new federal work will act as a deterrent. In fact, based on the president's own assertion that the vast majority of federal contractors play by the rules, the existing deterrents and the current system for reviewing and adjudicating potential violations of labor laws are working effectively. That said, we recognize that there will be bad actors, but, again, based on historical GAO reports and the data in Senator Harkin's report (discussed in greater detail below), it is clear that contractors that violate federal labor laws are already being identified by DoL and the procuring agencies and that action is being taken against those that violate the law.

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[7] DoL Fact Sheet #67: The McNamara-O'Hara Service Contract Act (SCA), July 2009, available at http://www.dol.gov/whd/regs/compliance/whdfs67.pdf.

With regard to labor law violations, it is important to recognize that it is the Department of Labor that initiates reviews and administers federal contractors' compliance with federal labor laws through a number of DoL offices, such as the Wage and Hour Division and the Office of Federal Contract Compliance Programs. As such, the result of any reviews, including settlement agreements, penalties, or other punitive actions, should be known and recorded by the Department of Labor. If this is not happening, the administration would be better served by focusing on improving its own data collection and information sharing efforts rather than adopting another costly, complex compliance and reporting regime.

There is little evidence to demonstrate that the above existing authorities are not, or could not, be effective on their own, without creating new and significant bureaucracies as required by the E.O. In fact, much of the information collection that the E.O. imposes on contractors is information that the government already has. Rather than creating duplicative and burdensome reporting requirements, the government should examine its existing reporting mechanisms and identify and correct any shortcomings without duplicating that effort by imposing additional requirements on industry.

The Executive Order is Excessive

Many of the most complicated challenges associated with the E.O. are created by its expansion of, or redundancy with, the current compliance regime, while providing very little additional benefit to the government. For example, the E.O. fails to limit reporting requirements to findings directly tied to federal laws only. By expanding the reporting requirements to include findings related to "equivalent state laws," the E.O. adds significant and unneeded complexity. First, DoL does not have jurisdiction over these often disparate state laws. Nor does it have access to the associated compliance activities or penalties they impose on companies. Second, it is unreasonable to expect that any of the LCAs will have even marginal knowledge or understanding of even a few, let alone all 50 states' labor laws, administrative processes, and/or due process rights afforded to federal contractors who do business in those states.

Adding to the complexity of the E.O.'s inclusion of state labor laws is the fact that the E.O. does not limit reporting of state activity to violations tied to the performance of a federal contract. It is common for federal contractors to compete in the commercial marketplace in addition to the work done for the federal government, but it is also common that companies separate their federal and commercial business units for ease of complying with a myriad of other federal government-unique compliance, oversight

and reporting regimes. Because of this expansive coverage, companies would have to initiate a substantial data collection effort from all business units, even if the vast majority of its total revenue is derived from its commercial business. Additionally, because the E.O. fails to limit reporting of findings to only those in which there is a finding or acknowledgement of fault by the contractor, the reporting burden will be much more intensive than necessary or appropriate to meet the objectives of the E.O.

Given the E.O's inclusion of state labor laws beyond those tied to a contractors' performance of federal contracts, and the fact that there need not be a finding or acknowledgement of fault to trigger a report and review, it is easy to see just how massive a data collection and reporting effort will need to be undertaken by those companies simply wishing to bid on a federal contract. Many will sit out the competition because of it, even if there are no company violations, particularly because compliance reporting is required twice per year.

Ultimately, the E.O. should be focused on federal contractors, their compliance with federal laws, and on their performance of federal contracts. It is nonsensical to create a vast reporting structure that seeks to capture information that has nothing to do with the performance of federal contracts and expands well beyond federal labor laws, or in which the company was neither found to have committed, or admitted to, any wrongdoing.

In recent years there a have been a few reports seeking to highlight instances in which companies with labor law violations have received, or continued to perform, federal contracts. These reports are riddled with flaws that seek to paint a picture of contractor abuse that is woefully inaccurate. One such report, published by the office of Senator Tom Harkin in December 2013, reaches back to 2007 to identify contractors with OSHA and wage violations even if those violations had nothing to do with the companies' work under a federal contract. Also, the report included a listing of top contractors that were tied to instances in which back wages were owed to their employees. What the report failed to highlight is that, in nearly half of the top 15 cases listed in the report, the contractor was not at fault for the violations. Many contract-related cases involving back pay occur because the contracting agency, i.e. the government, failed to include required Service Contract Act or Davis-Bacon Act clauses or correct wage determinations into the contract. While long viewed as technical or administrative errors, they have never been objectively considered evidence of willful behavior. Yet under these circumstances, federal contractors are often adversely affected by mistakes by the government. Also concerning is that the report failed to limit its finding to cases

that had been fully resolved, thus falsely inflating the appearance of contractor violations. We have seen time and again determinations later overturned by administrative bodies or the courts, but the E.O., like the Harkin Report, fails entirely to account for such actions.

The Executive Order is Ambiguous and Unworkable

The E.O. requirement that prime contractors mandate their subcontractors to report their violations of labor laws will be exceptionally onerous, if not impossible, for prime contractors to administer and creates a number of unintended consequences related to prime and subcontractor relationships.

First, the E.O. requires prime contractors to update their certification of compliance with labor laws every six months and requires the same reporting and certification by their subcontractors at identical intervals. The reporting burden on prime contractors for just reporting and certifying for their company is onerous in and of itself as discussed above. Adding subcontractor reporting adds a significant level of complexity to the information collection and related mitigating processes outlined in the E.O. Primarily, prime contractors cannot, and should not, be tasked with ensuring the labor compliance of their subcontractors or their entire supply chain on a recurring basis when such compliance is entirely unrelated to the federal contract under which the prime and subcontractor are partnered. Some larger contractors, for example, have supply chains and subcontracting agreements numbering in the tens of thousands. Just to review this number of companies is unexecutable even if only a limited number of companies have a reported violation of the E.O.'s covered labor laws. But if one-third of a large companies' supply chain has even a minor violation of a covered labor law, that could be 10,000 cases that need to be reviewed by the company and possibly by both the contracting officer and the yet-to-be created Labor Compliance Advisors. Not only do the companies not have the resources to conduct the reviews, the federal government would also be overwhelmed by responsibility reviews of even minor cases that would ultimately be cleared.

Second, the E.O.'s subcontractor flow-down requirement means that subcontractors will be providing sensitive business compliance information to their prime contractors. But the E.O. fails to recognize that many companies that subcontract with each other also compete against each other for other federal contracting opportunities. This business dynamic raises legitimate concerns by companies who do not want to provide information to their prime contractors because the prime contractor could use even minor infractions to gain a competitive advantage, or to initiate a contract award

protest, against the company in a future acquisition in which the companies were competing against each other. Again, why are we creating a vast new reporting regime, and placing the burden on industry, to collect information that the government already has, or should have, access to through existing channels?

Third, the E.O. requires a pre-award assessment of labor compliance on a proposal-by-proposal basis. For companies that bid on multiple opportunities, these reviews mean that different contracting officers, and different LCAs, will be making assessments about a contractor's labor record and may come to different conclusions after reviewing identical information about a contractor's historical compliance with labor laws. This subjective analysis means that, in some cases, a contractor could be determined to be "presently responsible" by one contracting officer but based on identical information found to be not "presently responsible" by another contracting officer. This lack of consistency creates enormous risk and uncertainty for both the government and contractors. Alternatively, once one contracting officer or LCA makes a determination that a contractor is not a responsible source, based on their individual subjective analysis, then it is foreseeable that every other contracting officer will make the same determination to avoid inconsistency or having to justify a different conclusion. Contracting officers are not labor law experts. Since contracting officers are faced with burgeoning workloads and pressure to get contracts awarded quickly, it is also foreseeable that a contracting officer would avoid making any award to a contractor with any labor violation simply to avoid the time, burden, and delay associated with coordinating with the LCA or having to justify making such an award. Under these scenarios, and given the fact that mere allegations would be considered during reviews, a contractor would be confronted with a de facto debarment without being afforded the due process that is required to be provided to contractors under existing suspension and debarment regulations.

Fourth, in order for the E.O. to be implemented in a workable manner, the federal agencies would have to hire a significant number of new staff to serve as (and support) the role of the LCAs. Within the Department of Defense alone, the LCA would be required to support the activities of approximately 24,000 contracting officers and hundreds of contracting offices. Additionally, the LCA would need significant additional resources to support prime contractors seeking guidance about whether potential subcontractors' violations warrant a decision by the prime contractor not to award a subcontract to the entity. As stated above, for some large prime contractors that have several thousand subcontractors and suppliers, the needed reliance on the LCA could be tremendous. Even if the federal government could somehow ramp up its capacity to

provide LCAs and related resources to the federal agencies and prime contractors, a significant amount of time would be needed to effectively train personnel in the new positions to correctly carry out their duties in a fair and consistent manner. The cost of hiring and training new personnel will be substantial.

Fifth, the E.O. is riddled with undefined and ambiguous terms that add to the complexity of adopting a meaningful approach. For example, the E.O. directs contractor disclosure of any "administrative merits determination, arbitral award or decision, or civil judgment (as defined in guidance to be issued by the Department of Labor)" against the offeror within the preceding three year period for violations of any number of listed federal or "state equivalent labor laws." Currently, it is unclear how the term "administration merit determination," or "arbitral award or decision" would be defined. Because of the implications of such "decisions or determinations" under the E.O., it is essential that such terms be fully and objectively defined and that the definitions clearly state that such decisions or determinations are only based on cases that have been fully adjudicated. Such an approach is crucial, considering that, during initial conversations between industry and DoL, some DoL officials stated their view that mere allegations about contractor violations of labor laws could be taken into consideration by the federal government. Again, taking such an aggressive approach would rob contractors of their due process rights and assumes guilt well in advance of a fully adjudicated finding. To include in the definition findings that are not fully adjudicated raises the risk of situations where an agency prematurely takes action detrimental to a company (and the government buyers) when the allegation may be reviewed and ultimately dismissed.

The term "serious, repeated, willful or pervasive nature of any violation," must also be fully and objectively defined by DoL. The E.O. states that where no existing statutory definitions are available, DoL would be tasked with "developing the standards." Of particular concern is how "repeated" may be defined. Is a company with hundreds of federal contracts and thousands of employees to be treated the same way as a very small company when both are found to have "repeated" violations of labor laws?

The Executive Order will Cause Procurement Delays

The federal contracting process is already widely criticized for being overly burdensome and too slow. The E.O. could add significant delays to the federal procurement process pending resolution of even the smallest of infractions that would eventually lead to a contracting officer's affirmative responsibility determination. Such delays may be further exacerbated by disputes between LCAs and contracting officers about a contractor's present responsibility. Further questions must also be addressed regarding

how such disputes are to be resolved. Delays would also be driven by prime contractors having to delay moving forward with contract performance while they await support and guidance from LCAs about the present responsibility of any of their subcontractors. Finally, the increase in procurement award protests because of the E.O. standards will further lengthen the time of the federal contract award process.

The Executive Order Will Result in Less Competition for Federal Contracts and Increased Costs of Doing Business with the Government

In addition to the substantial reporting and related costs associated with complying with the E.O., the E.O. will subject contractors to significant risks. Such risks include increased liability associated with potential false claims or false statements accusations because of inaccurate reporting or certifications of compliance under the E.O. Rather than risking such liability and complying with burdensome and costly requirements of the E.O., some companies will simply choose not to do business with the federal government. Ultimately, this only hurts federal agencies by denying them the ability to access companies that may be able to offer the best and most cost-effective solutions. The E.O. will also discourage new entrants from coming into the federal marketplace because of the significant business risks and extraordinary requirements not required in the commercial sector. These effects on the federal marketplace are particularly concerning because they are contrary to this administration's separate initiatives aimed at reducing regulatory burdens and reducing the cost of doing business with the government in the hope that more commercial companies, and particularly small businesses, will compete for federal contracts.

Conclusion

Mr. Chairmen, this Executive Order fails on so many fronts that it can never be effectively implemented in its current form. As I stated when I opened my statement, more can be done to ensure that intentional violators of the law do not receive federal contracts. But this Executive Order is not the right approach. It should be rescinded and the administration, Congress and industry should be tasked to work together to find alternative solutions that rely considerably on the existing regulatory and statutory framework. I have already offered PSC's engagement to key representative of the Executive Branch. It is essential that Congress also be engaged in this process, and that is why I commend and thank you for your attention to this issue and for holding this hearing today. PSC looks forward to working with you, the Congress and the administration on needed improvements. Thank you for the invitation to appear here today. I look forward to answering any questions you might have.

Chairman WALBERG. I thank the gentleman.

I thank all of the panel for your testimony and look forward now to questions that can bring further clarification to this issue. Again, the whole effort of this panel is to find a means by which we, indeed, can make sure that our contracting system produces the right things for the employers, for the government, and for the taxpayer, and that the systems in place are usable and used effectively to make sure that that happens.

I now recognize myself for five minutes of questioning.

Mr. Soloway, it is evident that there are no contractors on this panel. And again, that is not because we haven't had contractors submit a lot of concern about this proposed executive order, but it is a concern that they feel, right or wrong, potential retaliation for being here. So you are the guy in the hot seat to answer some of the questions, I trust.

Can you explain some of the frustrations your members have with this executive order and how they feel about being targets of excessive administrative action over the past year?

Mr. SOLOWAY. That is a large question, but this is about the fifth or sixth executive order in the labor realm that we have seen over the last few years from this administration, not just the last year. By and large, the earlier executive orders were not nearly as controversial, though implementation and execution was a challenge, but we all agreed with, again, the intent there.

This is by far the most sweeping that we have seen, and it raises a number of concerns, because the fundamental policy question that drove this issue back in the 1990s in the Clinton administration was whether you could actually deny a contract to a company for something they did in work that was unrelated to the work for the government. For example, the BP oil spill—would that have been a reason to deny BP a government contract since the oil spill was not a government contract?

That issue has been long since decided, and the answer is yes you can, and we do it routinely today.

So from our perspective, from the company's perspective, they know that they are responsible to adhere to federal law. They have extensive compliance systems in place. But the concern is that we are continually shifting responsibility for massive compliance regimes on the companies rather than focusing on the much smarter and more effective method of saying—of, as I said, collecting information once and using it multiple times.

Why would I do this every six months? Why does the government not use the Office of Federal Contract Compliance, DOL Wage and Hour Division, all the other elements of government that have responsibility for labor law implementation and have records of who has violated what when and where?

Why are those information systems not centrally feeding into an area where people can use it? Why do I, as a company, need to go through that detail? And the regulatory compliance burdens here are enormous.

Second, it is a certification. You are not just saying, "I think I am responsible"; you are saying as a company that, "We have no violations that would be reportable."

If I am wrong and I don't know about something that a field office in Texas or elsewhere did, I am liable—I will leave it to my legal colleagues, but I am liable under the *False Statements Act* for some very, very severe penalties.

And third, there is already mammoth exercise of oversight by the Department of Labor. The Department of Labor itself has talked about adding I think it is over 1,000 investigators over the last six years on *Service Contract Act*.

Companies are routinely dinged. And even when the fault is with the government, the company often has to make the employee whole.

So I think it really—the concern on our part is this just really ignores the massive complexity of the system and is just—it is a blunt instrument that is unnecessary.

Chairman WALBERG. Okay.

Ms. Styles, the executive order unfairly slants the federal contracting competition against contractors with minor infractions that may have no bearing on the employer's integrity or business ethics. Could you explain how requiring contractors to disclose this information affects the relationship between prime contractors and subcontractors?

Ms. STYLES. Well, it completely changed the dynamic between prime contractors and subcontractors. So right now under the law, the dynamic is largely one of an arms-length transaction for good reason. So you want your prime contractors going to the marketplace and competing the subcontract work and having an arms-length transaction between them.

This causes the prime contractor to become very involved in the subcontractor's business, which is not the way that it operates right now. The prime contractor is going to have to ask for this list, they are going to have to understand it, they are going to have to go back and consult with the Department of Labor and the labor compliance advisors and determine whether the remedial action is appropriate.

And what happens when it turns around and you are their subcontractor? Because even the largest of companies are prime contractors and subcontractors, and they team together, and they are primes to each other and subcontractors to each other. So you are sharing what is, you know, very sensitive information and giving the prime contractor an extraordinary ability to try to negotiate some deal related to labor issues.

Chairman WALBERG. Is there a concern also about disclosing trade secrets in this process?

Ms. STYLES. Absolutely. So, you know, and then what happens when it changes around and they are the prime and you are the sub in another situation and you have just disclosed trade secrets, or they are competing against you in another procurement?

Chairman WALBERG. I see my time is about expired so I will not violate my own rules.

And so I will now recognize the distinguished lady from Florida, Ranking Member Ms. Wilson.

Ms. WILSON of Florida. Thank you, Mr. Chairman. Some of the people you see in the audience are from Good Jobs Nation.

And, Ms. Walter, these workers are actually wearing stickers on their sweatshirts with the amount stolen from them in wages—actual money from these workers. So as I listened, one witness testified that there is no evidence of willful, pervasive, or repeated violation of federal contractors that would merit adopting this executive order.

Do you agree with this conclusion? Could you please give us some specific examples of pervasive or repeated violations? I would appreciate it.

Ms. WALTER. Certainly. And I should say, I had said in my opening remarks that the HELP Committee's report found that there were $82 million in wage theft violations found at these companies that they—that were severe violators of federal contracts that continue—or severe violators of wage theft laws that continued to receive federal contracts.

This included paying workers at chemical weapon storage facilities for time spent—not paying workers at chemical weapon storage facilities for time spent donning safety gear. I mean, these were workers who were protecting us as Americans, and they were owed in 18 instances $6 million in—or they were owed—there were 18 instances of back pay, but yet they continued to receive federal contracts. And this affected 1,300 workers.

There are issues of workers being—failing to pay more than 25,000 workers at call centers for overtime, and this was—this involved Cingular Wireless, and yet AT&T continued to receive $620 million in federal contracts.

And work—instances of mis-classing workers responsible for helping recently released prisoners reenter society and find work, owing these workers $1.7 million in back wages, and yet the company continued to receive $28.8 million in federal contracts.

Ms. WILSON of Florida. Thank you.

In Florida there is a construction company called Concrete Plus. They went after contracts for 20 jobs with state or federal funding—mainly projects to build or improve low-income housing. It won just seven, well below the company's usual rate of success.

Concrete Plus was constantly underbid by companies that were cheating by misclassifying employees. Is misclassification of employees a way for contractors to shift costs to workers or leave them without basic protections, such as workers' compensation, and thus underbid a job?

Ms. Walter?

Ms. WALTER. Certainly it is.

From that story from McClatchy that uncovered the issue of Concrete Plus and the *American Recovery and Reinvestment Act* funds we found that they documented the real story of one company trying to do well by their workers and being underbid over and over again on these—the Recovery Act funds. And this definitely transferred to companies throughout the Recovery Act and throughout the contracting system in general.

And what we see is that at the state level there have been lots of states who have undertaken this question of how do we ensure that our contractors are responsible by and ensure that it is efficient contracting process? And some of the states have specifically looked at misclassification of independent contractors as an issue.

Minnesota is one of the most recent examples that passed a law that became effective in 2015 that takes a closer look at the misclassification issue.

Ms. WILSON of Florida. Thank you.

This question is for Mr. Soloway and Ms. Styles: Five trade associations for general contractors—especially trades covering sheet metal, mechanical, electrical, finishing, bricklayers—submitted a statement today applauding the executive order as sound public administration propriety policy.

Operating under the banner of Campaign for Quality Construction, they said that the E.O. will promote high workforce standards for the benefit of the public project owner—that is the taxpayer. It will raise the bar in the market for federal construction, and they contend it will enhance due process rights for contractors in the procurement process, compared to the status quo.

While these contracting groups have suggestions to make the executive order workable through the rulemaking process, is there something that these five trade associations, which represent thousands of construction workers, failed to appreciate regarding the implication of this executive order?

Why don't these companies see the E.O. as harmful to their economic self-interest, as you seem to suggest it will be for the companies you represent? Do these companies want to uphold a higher standard than the companies you represent?

Chairman WALBERG. The gentlelady's time is expired, but for the record, let's get a brief answer.

Mr. SOLOWAY. I will just be very brief and say no, I don't think it suggests that they want to be held to a higher standard. I don't know enough about the construction side of the business and so forth to understand and—nor would I comment on what other organizations are saying or doing.

I would be very careful, however, when we hear things like "wage theft" terms, because it does occur and it needs to be punished and it needs to be dealt with. But it needs to be determined to have been intentional and willful.

"Misclassification" is also a very tricky term, and it takes a—we don't have time today to go into how it actually works when you are under the *Service Contract Act* and you are classifying a position. Misclassification can be done by the Department of Labor, it can be done by a contracting officer, it can be done by a company, and it can be all across the board.

So I would be just very careful at sort of accepting at face value that all these things amount to unethical lowballing of government contract prices in the workforce, because I don't think that is the case.

Chairman WALBERG. Thank you.

I now recognize my colleague from Alabama, Mr. Bradley Byrne.

Mr. BYRNE. Thank you.

Ms. Walter asserted that there was a problem with the present process.

I would like to ask you, Mr. Goldsmith, given your 40 years of experience, do you see any deficiency in the present process to determine if we have got a bad actor in a government contractor?

Mr. GOLDSMITH. I don't, Mr. Byrne. As has been pointed out by other witnesses, the government has had in place for many, many years systems to deal with bad actors and the like.

I would add that saying an entity is a bad actor is a question of definition. It doesn't necessarily suggest that an employer is a bad actor for having, for example, had a charge filed with the NLRB or the EEOC or, for that matter, the Department of Labor under the FLSA, and had decided, for whatever reasons, to resolve that charge. And that doesn't make that entity a bad actor or an entity that doesn't act with integrity.

I think part of the problem with this entire executive order is that words are used without really much care for what they mean and how they have been interpreted even by the courts. And to use, frankly, words like "bad actor," "pervasive," "longstanding," and other words, "law-breaking" is just—simplifies something that is not at all simple.

Mr. BYRNE. I appreciate that.

Ms. Styles, given your substantial experience, do you find the present process that we have insufficient in any way?

Ms. STYLES. Not at all. It is a very robust process for suspension and debarment.

Companies that have had integrity issues, that have had labor issues, are considered by the suspension and debarment officers at the various federal agencies. Some federal agencies are better at it than others; I think there are some ways to make some of them more robust in terms of how they consider particular issues, be they labor issues or be they other integrity issues.

But the system is there. The system is robust. It is fair, it has an appropriate level of due process.

And many of the examples that I have heard here today, you know, my question is why weren't they sent to the suspension and debarment officer at the various agencies? I mean, if there is a problem then it needs to go to them so they can fairly consider whether that business should be doing business with the federal government anymore.

Mr. BYRNE. Mr. Soloway, same question to you, given your substantial experience.

Mr. SOLOWAY. I don't think it is a process issue, sir. I think it is a question of the appropriate, efficient collection of information and sharing of the appropriate information across the system, because there are so many tentacles to the compliance regime.

And I think to Ms. Styles' points, if you look even at the Senate HELP Committee report, there were numerous cases in there where the contracting officer didn't even look at the excluded parties list, which is designed to list all of these companies that are not appropriate recipients—didn't even look to see if they were on there. So yes, they got a contract.

So I think it is not the process; I think it is the sharing and gathering of information by the government internally, for its own uses, not putting this burden on the private sector.

Mr. BYRNE. Ms. Walter, I want to give you an opportunity to respond to that. Tell me what, from your experience and your expertise, leads you to the conclusion—which is contrary to what these three people with substantial experience have—what, in your expe-

rience, your background and expertise, leads you to your conclusion where you disagree with them?

Ms. WALTER. Certainly. I think the Harkin report is a great example, and that is not the first report to find that—

Mr. BYRNE. But that is a report. I am asking what is your experience, based—they stated their experience. What is your experience here before the Committee today that leads you to that conclusion? Not a report—

Ms. WALTER. Oh, well, I can tell you about my experience talking with business owners who say that that is a problem. We have heard from business owners who have, at the District of Columbia level, have said, "Before they passed the responsible bidder provision I couldn't compete. It wasn't worth it. Now that there is a responsible bidder provision in place, I can compete. There is a fair playing field."

Mr. BYRNE. Do you have a list of those businesses you talked to?

Ms. WALTER. Certainly.

Mr. BYRNE. Would you submit that to the Committee.

Ms. WALTER. I can submit some letters and—some more information. I am happy—

Mr. BYRNE. Okay. Other than reading a report and talking to some businesses, what experience do you have to lead you to that conclusion?

Ms. WALTER. Well, I am a researcher at the Center for American Progress, so I can talk to you a little bit about the research we have done about these problems translating to poor quality for taxpayers, as well. You know, we found that one in four companies with these sorts of violations also had significant performance problems.

This included contractors KBR being assessed $1.1 million in back wages for violations of the *Davis-Bacon Act*. Contractors then—the company continued to receive significant federal funds—$11.4 billion over five years.

In the end, there were performance problems: contractors submitting fraudulent billing statements to the federal government, failing to meet a performance level—

Mr. BYRNE. My time is going to run out, so I am making sure—you have talked to some businesses, got some research—

Ms. WALTER. We certainly do. We certainly do.

Mr. BYRNE.—and that is what you are bringing to bear to make the conclusions you have made.

Thank you, Mr. Chairman. I yield back.

Chairman WALBERG. Thank the gentleman.

Before I recognize the next colleague I want to welcome our friend and colleague from Minnesota, Mr. Keith Ellison, to join us at the dais here.

I know you have a strong interest in this issue. We are glad to have you join us.

Without objection? Hearing none.

Welcome.

I now recognize the gentleman from Colorado, Mr. Polis.

Mr. POLIS. Thank you, Mr. Chairman.

Ms. Styles, I—you have a rather ominous prediction that you have given us of what will occur if the E.O. is implemented. To be

specific, you said if the E.O. is implemented, "purchases by the federal government will grind to a halt."

Does that mean that if the E.O. is implemented there will not be any purchases by the federal government—there cannot be any purchases by the federal government?

Ms. STYLES. No. That is not at all what I mean. I just think that the process that is put into place by the executive order is so—such an overwhelming administrative burden in terms of the number of steps they have to go through—

Mr. POLIS. So what does "grind to a halt" mean if it doesn't mean "stop"? Because usually "halt" means "stop," so if it is—if they are not going to stop federal purchases, what do you define "grind to a halt" as?

Ms. STYLES. They will be really slow. Only the most important ones will be able to—

Mr. POLIS. So grind to a slower pace perhaps, not grind to a halt?

Ms. STYLES. Significantly slower pace, yes.

Mr. POLIS. Would you like to change your testimony, as opposed to grind—or do you want to keep it as "grind to a halt"?

Ms. STYLES. I will keep it as "grind to a halt."

Mr. POLIS. So then how do you define "halt"?

Ms. STYLES. Some of the most important purchases that we need to make aren't going to happen—

Mr. POLIS. Okay, well—reclaiming my time—"halt" means "stop." So you are saying federal purchases will stop. I again offer you an opportunity to modify your testimony if you would like.

Ms. STYLES. I am not going to modify my testimony—

Mr. POLIS. So again, you are—now you are contradicting yourself. You told us, this Committee, that federal purchases would halt, which means stop, if this E.O. went through. I just asked you, "Would federal purchases stop if this E.O. went through," and your answer is again—I will give you another opportunity to answer that?

Ms. STYLES. I think many will.

Mr. POLIS. Some will, and others will go through under this E.O.

Ms. STYLES. I am sure some will go through, yes.

Mr. POLIS. Okay. So again, your testimony to us is that if the E.O. is implemented purchases by the federal government will grind to a halt. You didn't provide any conditions to that statement. So again, if you are saying federal purchases will slow—but you did not agree to make that change—

Ms. STYLES. I can say "generally grind to a halt," if that would be better.

Mr. POLIS. Okay, will "some"—how about "some purchases by the federal government—″

Ms. STYLES. I will say "generally grind to a halt."

Mr. POLIS. Okay. Again, if you are saying that some might grind to a halt, perhaps the ones that would stop would be the ones from pervasive violators of our labor law.

I would like to go to Ms. Walter on that.

Now, there have been several states, including New York, Minnesota, and Massachusetts, that have required labor compliance reviews, similar to those under this E.O. I would like to ask you if federal purchases have generally halted in New York?

Ms. WALTER. No, they haven't.

Mr. POLIS. Have federal purchases generally halted in Minnesota?

Ms. WALTER. No, they haven't.

Mr. POLIS. Have federal purchases generally halted in Massachusetts?

Ms. WALTER. No.

Mr. POLIS. Can you answer why they might not halt in those states if we are given this testimony that somehow they are going to halt in the country—generally halt?

Ms. WALTER. I can't say why Ms. Styles is—Ms. Styles is predicting that. What I can say is that they are using these programs successfully. They have been able to efficiently use systems such as prequalification to get contractors—take a closer look at contractors and still uphold high standards.

Mr. POLIS. Has there been any noticeable or observable slowdown in the efficiency of contracting in New York, Massachusetts, or Minnesota?

Ms. WALTER. No. And I would say that other sorts of contracting standards, such as the contracting living standard that was implemented in Maryland, actually increased competition.

Mr. POLIS. Now, so getting back to kind of why we are here today, do you think that under current rule there are adequate mechanisms to exclude companies with unacceptable labor practices?

Ms. WALTER. No. The current regulations have a—well, and let me be clear here: Responsibility review is not about suspension and debarment.

This is about upholding higher standards, taking a closer look at companies with problems, and when there is a problem, resolving those problems so that that company can come back into the fold and bid in a responsible manner that isn't going to shortchange its workers and put them in harm's way.

Mr. POLIS. And to be clear, in this proposed executive order, is there any black list?

Ms. WALTER. No. No. That is—

Mr. POLIS. And the same label, as you know, was applied to the 2008 legislation, which created a federal database that includes certain federal contractors. It seems that it is common every time there is more contractor accountability added opponents seem to label it "blacklisting."

There is no, again, for the record, the expert testified there is no blacklist in this, nor has there been a general halt to contracting in the states that have moved forward in this regard. I also am confident that there would not be any form of general halt of contracting here at the federal level.

Really we are discussing the inadequacy of current mechanisms of enforcement of labor practices among federal contractors. There are gaps to be filled. The E.O. goes some of the way towards doing that.

But certainly companies need to be held accountable if workers aren't being paid, if they are engaged in discriminatory behavior, and I think that this E.O. represents the first step toward imple-

menting the congressional intent with regard to applying the law to federal contractors.

And I yield back the balance of my time.

Chairman WALBERG. I thank the gentleman.

I now recognize the gentlelady from North Carolina, Dr. Foxx.

Mrs. FOXX. Thank you, Mr. Chairman.

I want to just make a point for the record, there have been some statements made about suspensions and disbarments, and it is my understanding that during fiscal year 2012 and 2013, DOL registered no suspensions or disbarments of federal contractors, and I will give the source of this for the record, if I might do that later on.

[The information follows:]

Report by the Interagency Suspension and Debarment Committee
On Federal Agency Suspension and Debarment Activities for FY 2012 and FY 2013

The Interagency Suspension and Debarment Committee (ISDC) is required to report to Congress on the status of the Federal suspension and debarment system each year.[1] Specifically, the ISDC must report: 1) progress and efforts to improve the suspension and debarment system; 2) agency participation in the Committee's work; and, 3) a summary of each agency's activities and accomplishments in the government-wide debarment system.

This report discusses the ISDC's progress and efforts to improve the suspension and debarment system by ensuring the fair and effective use of suspension and debarment. It provides data for FY 2012 and FY 2013 on agency suspension and debarment actions, as well as agency participation in the ISDC's work. Individual agency activities and accomplishments are highlighted in the appendices.

I. Ensuring the Fair and Effective Use of Suspension and Debarment

The ISDC is an interagency body consisting of representatives from Executive Branch organizations that work together to provide support for suspension and debarment programs throughout the Government.[2] All 24 agencies covered by the Chief Financial Officers Act (CFO Act) are standing members of the ISDC. Additionally, 18 independent agencies and government corporations participate on the ISDC. Together, ISDC member agencies are responsible for virtually all federal procurement and non-procurement transactions.

The ISDC promotes the fair and effective use of suspension and debarment in at least three important ways, namely by (1) helping agencies build and maintain their capability to consider suspension and debarment remedies, (2) reinforcing long-standing principles of fairness and due process, and (3) helping to coordinate activities when more than one agency is interested

[1] Section 873(a)(7) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417.

[2] The ISDC was initially created in 1986 to monitor implementation of Executive Order 12549, which established a suspension and debarment system for non-procurement matters such as grants, insurance and guarantees. Since its initial establishment, the ISDC has grown to take cognizance of procurement debarment matters in addition to its original non-procurement jurisdiction. The Federal government uses two debarment rules. The Nonprocurement Rule is codified at Title 2 of the Code of Federal Regulations (CFR) in Part 180 and separate agency enacting pieces promulgated in Subtitle B of that Title. The Federal Acquisition Regulation (FAR), or procurement rule, is found at Title 48 in the C.F.R. at Part 9.4. Both rules have reciprocal effect. A suspension or debarment under either rule renders the respondent ineligible for participation in procurement and nonprocurement transactions throughout the Executive branch.

in suspending or debarring the same contractor or discretionary assistance, loan, and award recipient.[3]

1. Helping agencies build and maintain the capability to consider suspension and debarment. Suspension and debarment protect taxpayers from fraud, waste and abuse by allowing agencies to exclude entities and individuals that have shown they are presently nonresponsible and unable to conduct business with the Government. For the past several years, the ISDC has accelerated efforts to make sure agencies are properly positioned to give appropriate consideration to these tools. These efforts have been guided by direction provided by the Office of Management and Budget (OMB) which instructed all agencies subject to the Chief Financial Officers Act (CFO Act) to take a number of actions to address any program weaknesses and reinforce best practices. See OMB Memorandum M-12-02, *Suspension and Debarment of Federal Contractors and Grantees* (November 15, 2011), available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf.

While there is more to be done, agencies are taking steps, with the support and active assistance of the ISDC to enhance suspension and debarment programs to better protect the Government from fraud, waste and abuse.

Actions taken by all CFO Act agencies. In FY 2012 and FY 2013 each of the 24 CFO Act agencies reported to the ISDC that:

- The agency has an accountable official for suspension and debarment activities. In the majority of agencies, this official is the suspending and debarring official (SDO).

- The agency took steps to address resources, policies, or both to strengthen the consideration of suspension and debarment. Noteworthy examples include:

    - Formally establishing suspension and debarment programs;

    - Dedicating greater staff resources to handle referrals and manage cases; and

    - Simplifying processes for making referrals and implementing new policies that require automatic referral for suspension or debarment consideration to the agency debarment program in certain situations.

- The agency has internal agency controls in place to support their suspension and debarment efforts. These measures increased transparency and consistency among

[3] Hereafter, for purposes of consistency the term "recipient" will be used in this report to refer to both "contractor" as used in FAR Subpart 9.4 and "program participant" as used in 2 CFR Part 180.

agency programs. Internal control measures include supplements to the FAR, standard operating procedures, handbooks, policy papers, bulletins, internal suspension and debarment councils to process referrals and regular conference calls with agency fraud counsel. The internal controls place an increased emphasis on coordination, such as sites to share suspension and debarment information, especially for large decentralized agencies, and cross-functional internal suspension and debarment councils with representatives from procurement, grants, fiscal, IG, and legal communities to review and monitor suspension and debarment activities.

- The agency has procedures to forward actions to the suspending and debarring official (SDO), and to track referrals with the assistance of an automated case management system.

Actions taken by the Department of Defense. Defense agencies, many of which have more mature suspension and debarment programs, continued to refine their practices. For instance:

- The Navy actively pursued fact-based debarments of recipients who had been terminated for default (poor performance) or who had mischarged costs against Navy contracts.

- The Defense Logistics Agency continues to lead efforts to consider suspension and debarment as a remedy in the fight against nonconforming parts entering the DOD supply chain.

- The Army completed a comprehensive revision of its Army regulation addressing procurement fraud to provide guidance to Army field attorneys regarding their responsibilities in closely coordinating with contracting officers, identifying fraud or performance issues, and providing guidance as to what evidence is necessary in order to propose particular recipients for suspension and debarment.

- The Air Force is utilizing tools that enhance transparency and due process. Examples of these tools include: requests for information, show cause letters, and terminations with conditions. A request for information is a tool used to gain information from a company when the SDO has information that is insufficient to move forward with a suspension or debarment, yet there is sufficient information to question the company's present responsibility. Whereas, a show cause letter is a tool to gain information from a company when the SDO has sufficient information to move forward with a suspension or debarment, but allows the company additional due process prior to the initiation of formal administrative proceedings under FAR Subpart 9.4. A termination with conditions is a hybrid administrative agreement that allows a company to continue to do business with the government so long as certain conditions are but does not involve the expense or burden that an administrative agreement requires.

Actions taken by civilian agencies. Many civilian agencies with recently developed or emerging programs at the start of the Administration have continued to show progress. For example:

- The Agency for International Development (AID) received a positive review from its OIG for its suspension and debarment program. Just a few years earlier, the IG cited the agency for significant weaknesses in its debarment and suspension capabilities. For example, in 2012, AID debarred 16 people for their participation in a scheme to submit fraudulent receipts for the administration of federal foreign assistance to support public health, food aid, and disaster assistance in Malawi. By working with its recipient organization to assure that the unlawfully claimed funds were not reimbursed, USAID was able to avoid waste and abuse of taxpayer funds designed to provide vital assistance to a developing country.

- The Small Business Administration (SBA) has maintained an active suspension and debarment program since 2010 as part of a comprehensive initiative to rid its small business programs of fraud, waste, and abuse, and ensure that the benefits of small business contracting go to the intended communities. Between 2009-2013, SBA has taken 140 debarment actions directly, and regularly assists "lead agencies" in evaluating small business issues to determine if suspension or debarment is necessary.

- The National Aeronautics and Space Administration (NASA) has significantly increased its suspension and debarment actions, as a result of its Acquisition Integrity Program in the Office of the General Counsel, which addresses issues and potential remedies related to procurement and non-procurement fraud. Between 1996 and 2007, NASA debarred 18 contractors. From FYs 2008-13 NASA has taken over 120 administrative actions ranging from suspensions, notices of proposed debarment, debarments, and administrative agreements. In FY 2012, NASA initiated the use of show cause letters to help ensure contractors' present responsibility. In FY 2013, NASA also conducted comprehensive fraud awareness training, which includes training on suspension and debarment as well as contractual remedies, for the entire NASA workforce.

- The Department of the Interior (DOI) uses enhanced program practices and procedures to support its own investigation and pursuit of suspension and debarment cases – a significant change from the past. Between 2001-2008, DOI took approximately 20 suspension and debarment actions, mostly through referrals to other agencies. From FY 2009 through FY 2013, DOI took 183 suspension and debarment actions, and, for the first time, took advantage of administrative agreements to resolve exclusions while providing the Department with effective oversight over a recipient's performance.

- The Department of Commerce (DOC) has taken steps to protect the Government's interest by invigorating its Suspension and Debarment Program. The Department has consulted with other agency officials, collaborated with the Office of Inspector General and the Office of General Counsel in the development of a strong program that effectively leverages DOC's resources. These efforts include the implementation of a case referral process in addition to the creation of the Suspension and Debarment Coordinator function to ensure that processes and procedures are followed in a timely manner. Recognizing the need for appropriate follow-up and constant communication,

the Department has instituted a suspension and debarment case management tracker which is utilized at monthly meetings between the Office of Acquisition Management, the Office of General Counsel, and the Office of the Inspector General. In FY2012 and again in FY2013, DOC conducted comprehensive fraud awareness outreach and training to the Department's staff through an annual two-day Acquisition Conference. From FY 2011 through 2013, DOC conducted 51 suspension and debarment actions.

- The Department of Health and Human Services (HHS) established a suspension and debarment organization with three dedicated staff. In FY 2012, it began to see an increased volume of referrals as its new robust program guidance, and training for department personnel, took hold. As a result, HHS's activity level rose significantly, from 1 action taken in FY 2012 to 52 actions in FY 2013.

- The Department of Justice (DOJ) issued the Attorney General's January 12, 2012 Memorandum titled "Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings" to all litigating and investigating components, and presented the Memorandum before the ISDC. DOJ's SDO issued three Procurement Guidance Documents (PGDs) to DOJ Bureau Procurement Chiefs, reminding DOJ of the important role of suspension and debarment in the procurement process and the various processes required in order to ensure DOJ contracts with responsible partners. The SDO also implemented a new electronic case management system to track referrals and follow-up activities to ensure timely disposition of suspension and debarment matters. Activity level for the Department of Justice also saw a significant increase from 37 actions in FY 2012 to 67 actions in FY 2013.

- The Department of State (State) created processes in FY 2012 for tracking referrals and follow-up activities and its SDO instituted quarterly meetings between the SDO and the State OIG. These program enhancements resulted in 50 actions in FY 2012 – more than the number of actions taken in the prior 3 years combined. Furthermore, State's activity level continued to show a significant increase in FY 2013, with a total of 96 actions.

- The Department of the Treasury (Treasury) issued a directive in FY 2012 to enhance the suspension and debarment process, including its referral process, and stood up an oversight council to coordinate and manage cross-functional activities, based on the recommendations of an internal task force that was set up to identify best practices. In FY 2013 Treasury developed and implemented a cutting edge electronic case management system.

Appendix 1 lists key internal controls agencies have in place to promote suspension and debarment programs.

2. Reinforcing long-standing principles of fairness and due process. The ISDC continues to reinforce the principles of fairness and due process by promoting best practices that enhance transparency and consistency in the Government-wide system. Concurrent with its efforts to strengthen agencies' suspension and debarment capabilities, the ISDC seeks to promote and preserve the principles of fairness and due process, as has long been required by both the FAR, which governs procurement actions, and 2 CFR Part 180, which covers non-procurement actions. The ISDC also seeks to help agencies keep processes "as informal as practicable." This informality, which has also been long recognized in regulation, arises out of the very nature of suspension and debarment as discretionary authorities inherent to each government agency's obligation to protect the Government when functioning as a consumer of goods or services. To act as responsible stewards, each agency must have the discretion to use its knowledge about the agency's mission and capabilities to make business risk assessments as to whether a potential government vendor or provider of services lacks integrity or present responsibility.

The ISDC has accelerated efforts to help agencies properly develop their suspension and debarment programs ensuring appropriate attention to administrative due process as laid out in governing regulations. These regulations, which set out a uniform minimum framework for actions, guarantee that:

- The respondent is provided with written notice of the cause for the suspension or debarment action in terms sufficient to put the contractor on notice of the factual conduct or transactional basis for the action, and to whom and how to contest the action.

- The respondent has an opportunity to appear in person, in writing, or through a representative and present information in opposition to the action.

- The respondent has the opportunity for an informal business format type meeting with the SDO, and receives a written final determination on the matter.

- Where facts material to cause for the action are genuinely in dispute, an informal evidentiary proceeding is conducted, transcribed by a court reporter for the administrative record at which the respondent may appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents, and obtain a copy of the administrative record.

Agencies' adherence to these basic requirements has been a key reason why courts have shown deference over the years to the decisions of agency suspension and debarment officials in response to legal challenges. The ISDC devotes significant attention to helping agencies successfully and consistently apply these principles of fairness and due process.

The ISDC maintains an online library of documents that promotes standardization and disseminates agency best practices. The documents include a sample practice manual and action documents, fact-finding procedures, and a case law compendium that illustrate how to implement the basic procedural steps laid out in the FAR and Part 180 described above. These documents reinforce that suspension and debarment are to be applied in the public interest for the government's protection and should not be used as regulatory compliance, enforcement, or costs collection tools. For example, the practice manual reminds agencies that the existence of one or more causes for suspension or debarment does not require an agency to suspend or debar a recipient and further reminds agencies to consider the seriousness of a recipient's acts or omissions and any remedial measures or mitigating factors, such as disciplinary action taken by the recipient or new or stronger internal control procedures that it has instituted.

The ISDC coordinates mentoring by agencies with well-established suspension and debarment processes and offers various other forms of training. As discussed above, over the last several years, agencies across government have successfully developed or strengthened their capabilities to use suspension and debarment in a reasoned and responsible manner. Since the beginning of Fiscal Year 2012, the ISDC consulted with thirteen agencies, including five of the agencies cited in the Government Accountability Office's 2011 report[4] (Commerce, HHS, DOJ, State, and Treasury). ISDC members continued to serve as instructors for the Federal Law Enforcement Training Center suspension and debarment training courses. The ISDC also joined with the Council of Inspectors General for Integrity and Efficiency (CIGIE) to cosponsor, on an ongoing basis, the joint CIGIE/ISDC annual debarment training workshop. The most recent workshop focused on developing and taking fact based actions, such as actions arising out of poor performance and negative audit findings. In addition, ISDC members provided technical support and trainers to a course the CIGIE Training Institute designed for Auditors and Attorneys. This CIGIE course is designed to enhance the ability of OIG audit, inspection, evaluation and counsel employees within Offices of Inspectors General to identify and produce suspension and debarment referrals. The ISDC also participated in learning and information exchange sessions sponsored by government agencies and private sector associations and met with Congressional oversight staffers to discuss government-wide suspension and debarment members.

The ISDC manages an informal "lead agency" process to help agencies coordinate among themselves when multiple agencies have a potential interest in pursuing suspension and debarment of the same entity. As discussed in greater detail below, the lead agency process helps to protect recipients from being subjected to multiple and potentially inconsistent actions while avoiding waste of federal resources.

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[4]See *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Government wide Oversight Could Be Improved (GAO No. 11-739).*

The ISDC is taking steps to make the suspension and debarment process more transparent. The ISDC launched an enhanced web portal, at https://isdc.sites.usa.gov/, to allow easier contractor and public access to agency debarment programs and debarment resources. The initial version of the enhanced site includes contact information on agency suspending and debarring officials and ISDC members. Additional information will be added to allow easier access to agency debarment programs and debarment resources.

3. Coordinating agency suspension and debarment actions. In some instances, more than one agency may have an interest in the debarment or suspension of a recipient. Because an agency action taken pursuant to the discretionary rules has government-wide reciprocal effect potentially impacting all federal agencies, ISDC members engage in a "lead agency coordination" process to help designate the lead agency. This informal process aids identification of the agency best situated and with the greatest interest to be the lead agency on a matter. The lead agency coordination process takes into consideration factors such as financial, regulatory, and investigative interests. This lead agency designation process promotes efficient use of federal resources and fairness to respondents.

Lead agency coordination is critical to supporting a government-wide system designed to address systemic problems. OMB and the ISDC are committed to ensuring the effective use of the lead agency coordination process to help agencies and recipients avoid needlessly expending funds for duplicative or inconsistent efforts. All CFO Act agencies have committed to supporting the lead agency process and the ISDC is working with the Small Agency Council to ensure smaller agencies are also actively engaged in this process. (As noted above, 18 government corporations and independent agencies, such as the Peace Corps, the Missile Defense Agency, and the Corporation for National and Community Service are members of the ISDC.) Furthermore, an ISDC standing subcommittee has been tasked with exploring ways to improve the lead agency process.

The ISDC is also working with OMB to apply lead agency concepts in the implementation of new statutory provisions that require the consideration of suspension and debarment before making an award to a corporation that either has been convicted of a felony or has unpaid tax delinquencies. Under these statutory provisions, an award cannot be made unless an SDO has considered suspension or debarment of the corporation and made a determination that further action is not necessary to protect the interests of the government. Sharing of information between SDOs will allow the funding agency to meet its responsibility to consider suspension or debarment by (1) considering another agency's determination as to why suspension and debarment is not necessary and (2) if it concurs with the other agency's determination, adopting that determination as its own without conducting an independent review of the entire record or requiring the corporation to appear and make a duplicative presentation. Ordinarily, there should be no need for the funding agency to conduct a further review or initiate

a new independent (*de novo*) review to meet its responsibility if it has reviewed the determination made by the other agency regarding why suspension or debarment is not necessary and is satisfied with the explanation provided in the written record created by the other agency.

In addition to its lead agency coordination efforts, the ISDC continued its efforts to encourage suspension and debarment in parallel with the pursuit or consideration of contractual, civil and criminal remedies. In furtherance of this effort, the ISDC took part in developing the CIGIE training discussed above, and provided member agencies with case studies on the effective use of parallel procedures. The ISDC also provided members with several presentations regarding the Attorney General's January 30, 2012, memorandum titled "Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings." This memorandum directed all United States Attorney's Office and litigating components of DOJ to ensure early and appropriate coordination of criminal, civil, regulatory and administrative remedies, including suspension and debarment.

II. Suspension, Debarment and Related Actions in FY 2012 and FY 2013.

As has been done for prior reports prepared in response to section 873, the ISDC surveyed agencies to provide data on suspension and debarment actions in Fiscal Year 2012 and FY 2013 The survey also sought information on related actions, including use of administrative agreements and voluntary exclusions.

1. Suspension and debarment actions. As shown in Table 1, CFO Act agencies issued 836 suspensions in Fiscal Year 2012 under the discretionary suspension and debarment rules. The Government proposed 2,081 individuals and entities for debarment, and ultimately debarred 1,722. In FY 2013, CFO Act agencies issued 883 suspensions. The Government proposed 2,244 individuals and entities for debarment, and ultimately debarred 1,715. For a breakdown by agency, see Appendices 2 and 3.

Table 1. CFO Act Agency Debarment and Suspension Actions

Actions	Fiscal Year 2012	Fiscal Year 2013
Suspensions	836	883
Proposed for Debarment	2,081	2,244
Debarments	1,722	1,715
Total Actions	**4,639**	4842

Seventeen agencies reported issuing a total of 122 "show cause notices/pre-notice investigative letters" in FY 2012 and 131 during FY 2013. See Table 2. These letters are pre-notice communications, which advise an entity that it is being considered for suspension or proposed debarment. These letters typically identify the assertion of misconduct that has been

brought to the attention of the SDO and give an entity an opportunity to respond within a specific period of time before the agency takes action.

Table 2. Show Cause Notices/Pre-Notice Investigative Letters

Agency	Fiscal Year 2012	Fiscal Year 2013
AID	1	1
DOC	4	0
Defense		
ARMY	17	12
AIR FORCE	15	45
DLA	1	3
NAVY	13	27
EPA	3	3
GSA	13	15
HHS	0	3
DHS	9	2
HUD	3	3
DOI	5	3
DOJ	1	0
DOT	4	2
NASA	2	2
SBA	18	4
SSA	10	4
TREASURY	3	2
Total	**122**	**131**

2. Administrative agreements. In addition to issuing suspensions, proposed debarments and debarments, Federal agencies reported entering into a total of 54 administrative agreements in FY 2012 and 61 agreements in FY 2013. See Table 3. Administrative agreements, sometimes referred to as administrative compliance agreements, ordinarily are considered after the recipient has responded to a notice of suspension or proposed debarment. The election to enter into an administrative agreement is solely within the discretion of the suspension or debarment official, and will only be used if the administrative agreement furthers the government's interest. As explained in last year's report, if properly structured, an administrative agreement creates an incentive for a company to improve its ethical culture and business process to avoid debarment. This mechanism allows respondents to demonstrate their present responsibility, when appropriate, in order to remain eligible for awards. Furthermore, the use of administrative agreements increases the Government's access to responsible sources and, thereby, promotes competition in the Federal marketplace.

While administrative agreements will vary by agency and individual settlement, all will require the entity to take certain verifiable actions, such as implementation of enhanced internal

corporate governance practices and procedures, including risk assessment processes, and adoption of compliance, ethics and reporting programs. Agreements may also call for the use of independent third party monitors or the removal of individuals associated with a violation from positions of responsibility within a company.

Table 3. Administrative Agreements

Agency	FY 2012	FY 2013
USDA	3	0
Defense		
AIR FORCE	3	5
ARMY	3	2
NAVY	1	2
EDUCATION	0	3
ENERGY	0	2
EPA	7	12
GSA	14	5
HHS	1	0
DHS	0	3
HUD	0	4
DOI	0	3
DOJ	4	5
NASA	3	0
NSF	0	1
SBA	5	3
DOT	9	11
VA	1	0
Total	**54**	**61**

3. Voluntary exclusions. The nonprocurement rule allows agencies to enter into voluntary exclusions with respondents in lieu of suspension or debarment. These voluntary exclusions prohibit respondents from participating in procurement and nonprocurement transactions government-wide. Agencies must enter all voluntary exclusions on the System for Award Management (SAM). ISDC member Agencies reported 12 voluntary exclusions entered for both FY 2012 and FY 2013. Table 4.

Table 4. Voluntary Exclusions

Agency	FY 2012	FY 2013
USDA	5	2
EPA	2	0
DHS	0	3
HHS	4	3
HUD	1	0
DOI	0	1
NSF	0	1
Total	**12**	**10**

4. Referrals and declinations. In FY 2012, member agencies reported more than 3,700 referrals and just over 200 declinations to pursue action. In FY 2013, member agencies reported 3942 referrals and 154 declinations to pursue action. Table 5. Referrals and counting conventions are based upon the common definitions listed in the Methodology section at the end of the report. See Appendix 4 for an agency breakdown of sources of information that resulted in opening suspension and debarment actions in FYs 2012 and 2013. A referral and subsequent action or declination by the SDO may cross fiscal years, so a direct comparison between referrals and actions taken will not produce a statistically reliable result.

Table 5. Referrals and Declinations

Agency	FY 2012		FY 2013	
	Referrals	Declinations	Referrals	Declinations
USDA	80	3	88	13
AID	131	0	57	0
DOC	6	1	3	0
Defense				
AIR FORCE	679	0	255	0
ARMY	668	4	660	15
DLA	198	0	375	0
NAVY	344	0	437	0
ED	57	0	71	0
DOE	26	7	35	0
EPA	224	15	338	6
GSA	229	17	361	26
HHS	22	0	42	0
DHS	340	0	444	0
HUD	372	149	381	81
DOI	80	0	49	0
DOJ	24	4	29	2
DOL	3	3	0	0
NASA	15	0	16	0
NSF	18	0	46	0
NRC	0	0	0	0
OPM	0	0	22	8
SBA	67	0	47	3
SSA	0	0	0	0
STATE	39	0	49	0
DOT	30	0	76	0
TREASURY	3	0	7	0
VA	60	0	54	0
Total	**3715**	**203**	**3942**	**154**

5. Five-year trends. The reported activity levels for FY 2012 and FY 2013 indicate a growing number of agencies with active suspension and debarment programs and a significantly increased number of suspension and debarment actions when compared to activity in FY 2009, when the ISDC formally began to collect data on this activity.[5] See Figures 1, 2, and 3.

The ISDC does not consider the overall number of suspensions and debarments as a metric of success, as the appropriate level of discretionary suspension and debarment activity in any given year is purely a function of circumstance and need. Instead, the ISDC encourages its individual member agencies – who are most knowledgeable about their agency's mission and capabilities – to review their own individual trends to determine if the level of activity is reflective of what is necessary to protect their agency and the government from harm.

[5] Following release of the FY 2011 Report the ISDC became aware of an error in the totaling of the number of reported debarments which resulted in overstating the total by 132. Additionally, in preparing the FY 2012 questionnaire, the ISDC learned that one agency consistently reported in prior years actions which were taken under authorities other than the discretionary suspension and debarment authority at Subpart 9.4 and Part 180. The previous years' data used in the graphs have been adjusted to correct these errors.

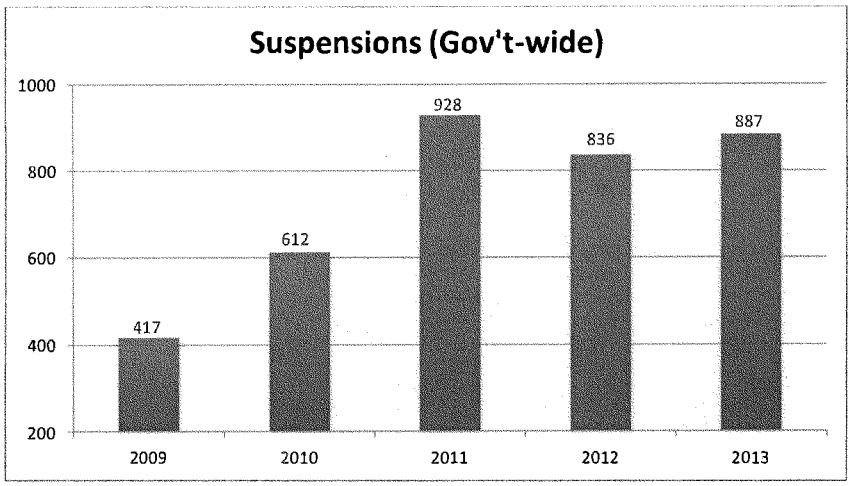

Figure 1

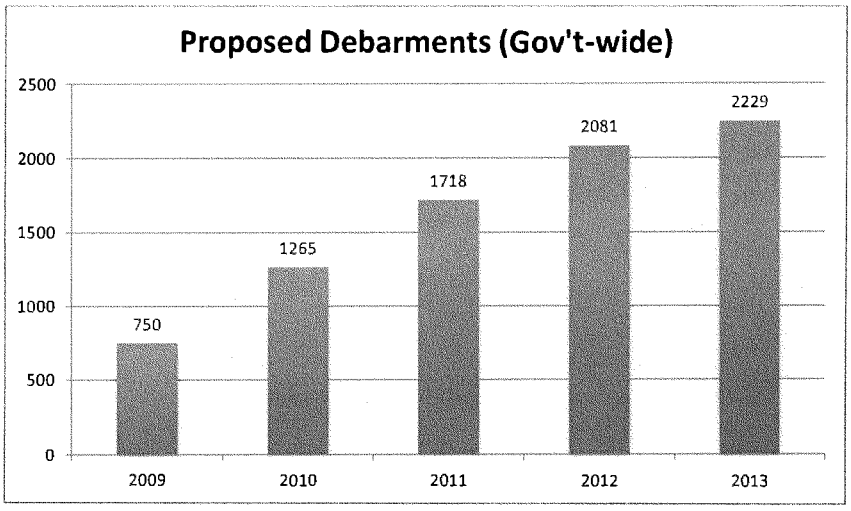

Figure 2

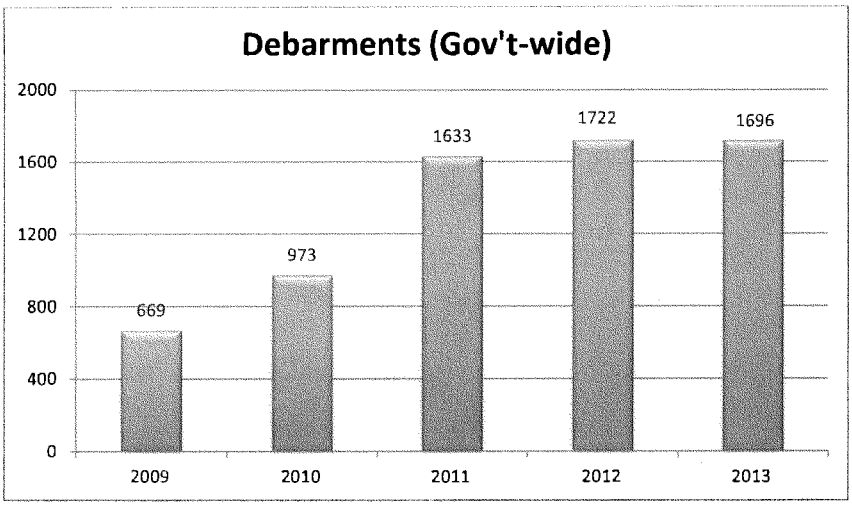
Debarments (Gov't-wide)
2000
1600
1200
800
400
0
669
973
1633
1722
1696
2009
2010
2011
2012
2013

Figure 3

Methodology

To help improve the consistency and accuracy of agency reporting, the ISDC has adopted the following definitions and counting conventions.

Definitions

"Referral" means a written request prepared in accordance with agency procedures and guidelines, supported by documentary evidence, presented to the SDO for issuance of a notice of suspension or notice of proposed debarment as appropriate under FAR Subpart 9.4 and 2 CFR Part 180.

Note: This definition eliminates potential variations due to differences in agency tracking practices and organizational structures. For example, agency programs organized as fraud remedies divisions (responsible for the coordination of the full spectrum of fraud remedies: criminal, civil, contractual and administrative) may not have a common starting point for tracking case referrals as agency programs exclusively performing suspension and debarment functions.

A "declination" means an SDO's determination after receiving a referral that issuing a suspension or debarment notice is inappropriate after receiving a referral. Placing a referral on hold in anticipation of additional evidence for future action is not a declination.

Counting conventions

Consistent with previous years' Section 873 reports, the number of suspensions, proposed debarments and debarment actions are broken out as separate exclusion actions even if they relate to the same respondents. With each of these exclusion actions, both FAR Subpart 9.4 and 2 CFR Part 180 require an analysis to be performed by program personnel involving separate procedural and evidentiary considerations. Furthermore, a suspension may resolve without proceeding to a notice of proposed debarment, a notice of proposed debarment may commence without a prior suspension action, and a proposed debarment may resolve without an agency SDO necessarily imposing a debarment. Moreover, separate "referrals" are typically generated for suspensions and proposed debarments. Finally, suspension and debarment actions trigger separate notice and other due process requirements by the agency.

Agencies were instructed to count individuals as one action regardless of the number of associated pseudonyms and "AKAs". With regard to the suspension or debarment of business

entities, however, businesses operating under different names or that have multiple DBAs ("doing business as") are counted separately as separate business entities or units.

The data in the appendices focus on the suspension and debarment activities of the 24 agencies and departments subject to the Chief Financial Officers Act. These are the agencies and departments with highest activity levels in procurement and non-procurement awards.

The Report addresses the discretionary suspension and debarment actions taken under the government-wide rules at FAR Subpart 9.4 and 2 CFR Part 180. The Report does not track statutory or other nondiscretionary debarments outside of the scope of these regulations.

Appendix 1
Actions and Infrastructure to Support Suspension & Debarment in FYs 2012-2013

			Internal agency controls in place			Additional administrative tools used by the agency		
Agency	Policies and/or Procedure for S&D	Case Mgmt. System for S&D Cases	Procedures to forward actions to the SDO(s)	Are referrals Tracked?	Lead Agency Coordination Participation	Show Cause Notices	Administrative Agreements	Voluntary Exclusions
Agriculture	✓	✓	✓	✓	✓		✓	✓
AID	✓	✓	✓	✓	✓	✓	✓	
Commerce	✓	✓	✓	✓	✓	✓		
Defense								
Air Force	✓	✓	✓	✓	✓	✓	✓	
Army	✓	✓	✓	✓	✓	✓	✓	✓
DLA	✓	✓	✓	✓	✓	✓		
Navy	✓	✓	✓	✓	✓	✓	✓	
Education	✓	✓	✓	✓	✓		✓	
Energy	✓	✓	✓	✓	✓		✓	
EPA	✓	✓	✓	✓	✓	✓	✓	✓
GSA	✓	✓	✓	✓	✓	✓	✓	
HHS	✓	✓	✓	✓	✓	✓	✓	✓
DHS	✓	✓	✓	✓	✓	✓	✓	✓
HUD	✓	✓	✓	✓	✓	✓	✓	✓
Interior	✓	✓	✓	✓	✓	✓	✓	✓
Justice	✓	✓	✓	✓	✓	✓	✓	
Labor	✓	✓	✓	✓	✓			
NASA	✓	✓	✓	✓	✓	✓	✓	
NSF	✓	✓	✓	✓	✓		✓	✓
NRC	✓		✓	✓	✓			
OPM	✓	✓	✓	✓	✓			
SBA	✓	✓	✓	✓	✓	✓	✓	
SSA	✓	✓	✓	✓	✓	✓		
State	✓	✓	✓	✓	✓			
Transportation	✓	✓	✓	✓	✓	✓	✓	✓
Treasury	✓	✓	✓	✓	✓	✓	✓	
VA	✓		✓	✓	✓		✓	

Appendix 2
Suspension & Debarment Actions in FY 2012 [1]

Agency	Suspensions	Proposed for Debarments	Debarments	Administrative Agreements
Agriculture	4	31	23	3
AID	14	46	37	0
Commerce	9	16	9	0
Defense	336	983	768	7
Air Force	76	369	234	3
Army	195	284	186	3
DLA	18	179	202	0
Navy	47	151	146	1
Education	29	22	51	0
Energy	19	19	17	0
EPA	114	138	98	7
GSA	22	101	75	14
HHS	0	1	0	1
DHS	16	300	260	0
HUD	171	234	233	0
Interior	16	43	38	0
Justice	13	16	8	4
Labor	0	0	0	0
NASA	0	8	4	3
NRC	0	0	0	0
NSF	7	8	8	0
OPM	0	0	0	0
SBA	13	14	14	5
SSA	0	0	0	0
State	18	21	11	0
Transportation	13	59	45	9
Treasury	3	0	4	0
VA	19	21	19	1
TOTAL	**836**	**2081**	**1722**	**54**

[1] The ISDC obtained this information through a survey of member agencies. The number of debarments does not include voluntary exclusion actions, which are reported in the narrative section of this report.

Appendix 3
Suspension & Debarment Actions in FY 2013

Agency	Suspensions	Proposed for Debarments	Debarments	Administrative Agreements
Agriculture	21	83	29	0
AID	11	20	15	0
Commerce	0	4	4	0
Defense	267	911	726	9
Air Force	39	216	192	5
Army	71	316	258	2
DLA	18	190	167	0
Navy	139	189	109	2
Education	38	44	30	3
Energy	15	20	33	2
EPA	196	151	112	12
GSA	10	125	102	5
HHS	8	36	8	0
DHS	32	367	281	3
HUD	175	213	178	4
Interior	19	36	33	3
Justice	13	28	26	5
Labor	0	0	0	0
NASA	4	8	4	0
NSF	6	18	7	1
NRC	0	0	0	0
OPM	0	2	0	0
SBA	9	40	7	3
SSA	0	0	0	0
State	11	38	47	0
Transportation	4	66	44	11
Treasury	2	1	1	0
VA	46	18	9	0
TOTAL	**887**	**2229**	**1696**	**61**

Appendix 4
Sources of Information that Resulted in Opening Suspension and Debarment Actions in FYs 2012-2013

Agency	CONTRACTING OFFICERS/CONTRACTING PERSONNEL	Other Agency Personnel/Whistleblowers	Outside Sources	Office of Inspector General
Agriculture	✓	✓	✓	✓
AID	✓	✓	✓	✓
Commerce	✓	✓	✓	✓
Defense				
Air Force	✓	✓	✓	✓
Army	✓	✓	✓	✓
DLA	✓	✓	✓	✓
Navy	✓	✓	✓	✓
Education				✓
Energy	✓	✓		✓
EPA	✓	✓	✓	✓
GSA	✓		✓	✓
HHS	✓		✓	✓
DHS	✓	✓	✓	✓
HUD	✓	✓	✓	✓
Interior	✓	✓	✓	✓
Justice			✓	✓
Labor	✓	✓	✓	✓
NASA	✓	✓		✓
NSF				✓
NRC				
OPM	✓	✓		✓
SBA	✓	✓	✓	✓
SSA				
State	✓	✓		✓
Transportation				✓
Treasury	✓	✓	✓	✓
VA		✓	✓	✓

Chairman WALBERG. Without objection.

Mrs. FOXX. Thank you.

I wonder, Ms. Styles, if you could answer a question for me? Can you describe the current process for contractor responsibility determinations?

What types of violations or allegations are taken into account when a contracting officer makes a responsibility determination? Can a contractor contest an adverse determination?

Ms. STYLES. Absolutely.

So there is a part of the Federal Acquisition Regulation, it is called Part 9, and a contracting officer, before they actually execute a contract with a company, has to go through a number of articulated steps to determine if the company is responsible. It includes everything from financial responsibility, to their past performance in particular jobs, to their integrity as a business. Labor violations absolutely can be taken into consideration, in terms of the integrity of a business, so in many ways this is already existing, in terms of the ability of a contracting officer to consider it.

If that decision is made—adverse to a contractor—by an individual contracting officer, it actually can be appealed through the protest process currently, but it is a pretty arduous process for appeal.

Mrs. FOXX. Thank you very much. Mr. Goldsmith, federal labor laws already contain remedies to address violations. How does this executive order, which introduces new remedies, effectively rewrite U.S. labor laws and run afoul of congressional intent?

Mr. GOLDSMITH. Well, it does precisely that. It augments existing remedies in a way that would not only put at risk contractors who currently have contracts with the federal government, but as a result of that, it really is unconstitutional.

It is not the prerogative of the President to decide to rewrite the laws to augment remedies. For example, under the NLRA the law has been longstanding that a—the government cannot—the executive branch cannot simply add to remedies, nor can the states, for that matter. It is a case called Gould that has been around for many years.

So this executive order does precisely that and it is unlawful?

Mrs. FOXX. You know, this is a recurring pattern with this administration, it seems to me. There are 57 oversight hearings going on this week in the House of Representatives, and I just wonder how many of those hearings are focusing on unconstitutional actions taken by this administration.

It simply is mindboggling that every day we learn of more and more of these unconstitutional actions being taken by an administration doing its best to write laws or rewrite laws, and we really need to start keeping long lists of these, because I don't think the American people are aware of all of the violations that have occurred.

Mr. Chairman, I am going to do something very unusual. I am going to yield back the balance of my time.

Ms. WALTER. Representative Foxx, could I make just one point on that?

Chairman WALBERG. No question was asked. Appreciate you can maybe work that into an answer of the next question you get.

I now recognize Mr. Scott for his five minutes of questioning.

Mr. SCOTT. Thank you, Mr. Chairman. And I would point out the fact that a oversight hearing was held does not—is not evidence that a—conclusive evidence that any violation has occurred. There are oversight hearings all the time.

Ms. Walter, you wanted to respond?

Ms. WALTER. Certainly. Thank you for giving me the time.

I just wanted to make clear that, first of all, the purpose of a responsibility determination is not to penalize a federal contractor but to promote an efficient procurement process. And the *Federal Property and Administrative Services Act* authorizes the President to create processes to ensure that contractors are responsible.

And the courts have actually upheld this right several times. They have upheld it under previous administrations, if you—including E–Verify proposals, the right to post notices for workers that—informing of their rights not to join unions; and it has been upheld during this administration with the Project Labor Agreements Executive Order.

Mr. SCOTT. Thank you.

Can you explain how this process is significantly different than the present process?

Ms. WALTER. Certainly. Right now there is a contractor responsibility database. However, significant number of labor law violations are not included in it, and there is no guidance for contracting officers on how they should implement these—if a contracting officer finds out about a legal violation there is no guidance on how they should consider it or how much of a warning sign this is.

What the order does is it allows, through a process that will include advice from labor compliance advisors, from the Department of Labor, it will provide contracting officers the information they need to make an informed decision. It is not requiring contracting officers to find a contractor not responsible because of anything that they report, but the reporting mechanism throws up a warning signal that contracting officers should take a closer look.

Mr. SCOTT. Ms. Walters, can persons with unresolved issues be punished?

Ms. WALTER. Again, it is not a punishment process. This—

Mr. SCOTT. Well, can people with unresolved issues have contracts withheld or not be awarded contracts because of allegations that haven't been resolved?

Ms. WALTER. So I am not a member of the administration, so I can't tell you exactly what the administrative merits determinations are going to include, but what I can say is that, again, this is about throwing up a warning signal, taking a closer look, figuring out what is going on in those instances and whether or not that would jeopardize taxpayer dollars to contract with that organization before they take remedial action.

Mr. SOLOWAY. Mr. Scott, can I offer a comment briefly on that? I don't want to take your time.

The answer to your question is absolutely yes, and this is one of the issues that has been missed in this discussion. Yes, we do not have the regulations yet to know exactly how they will be implemented, but the executive order sets the construct for those regulations and it very clearly references situations where there is no

finding of intent or willful violation. Allegations are included, and so forth, so the answer to your question is yes.

Mr. SCOTT. Well, you kind of fuzzified that intent. You could have a violation—

Mr. SOLOWAY. Correct. Correct. And there are multiple levels at which there are questions. One is on the allegations.

As you said a moment ago, the holding of a hearing is not necessarily proof of wrongdoing. We apply that same standard to the executive order.

Mr. SCOTT. Okay, well, let me follow through. If you have a contractor who is systematically underpaying, not paying overtime, and otherwise essentially cheating, what effect does that have on the competition?

Mr. SOLOWAY. Are you asking me, sir?

Mr. SCOTT. Yes.

Mr. SOLOWAY. Absolutely, that contractor shouldn't be considered if, in fact, that contractor has a repeated, willful history. There are a whole slew of opportunities for the government to deny that contractor the right to bid, and so I think that we have to be very careful here that we don't mix issues.

In the case here, we are not changing policy about whether companies can or cannot get contracts because they are law-violators. What we are doing is creating a broad new regulatory regime, and even mixing issues.

When we talk about what is going on in Massachusetts or New York or Minnesota, there are other standards that are far more prominent in those responsibility determinations, like do they pay a living wage? Well, the living wage debate is a very different debate. Contractors pay what the government tells them they have to pay job by job under the *Service Contract Act* or *Davis-Bacon Act*——

Mr. SCOTT. Well, is it true that people with chronic underpayments and chronic violations are getting contracts?

Mr. SOLOWAY. There absolutely may be cases of that, and that doesn't mean it is right. We are not defending that. There is nothing—

Mr. SCOTT. So we should do everything we can to prohibit people who are chronic violators of labor laws and fair wage laws from getting contracts.

Mr. SOLOWAY. And we have all the mechanisms to do it, as I said before.

I believe that fundamentally it is – A.) you have to deal with what is the violation, as you said. Has it been proven or is it just an allegation? And then the second question is, why are we not focusing on technology and information-sharing as the answer, which is what the logical answer is, rather than this massive burdensome regime that raises far more questions than it answers?

Mr. SCOTT. Time is up.

Chairman WALBERG. Thank the gentleman. Time is expired.

I now recognize Mr. Russell, the gentleman from Oklahoma.

Mr. RUSSELL. Thank you, Mr. Chairman.

And, panelists, thank you for your testimony today, thank you for your extensive work and experience and bringing light to this issue.

Mr. Goldsmith, given the enormous burden of reporting and compliance requirements that the executive order calls for, what, in your opinion, is the net effect of now having timely contracts and having the best companies provide government needs?

Mr. GOLDSMITH. I think it is going to be a huge burden. I think it is going to take some companies that would otherwise be federal contractors out of that business. It is going to add to a reporting burden that exists for not just major employers, many of whom can deal with it on one level or another, but especially for small businesses who have enormous difficulties complying with the existing burdens.

So now when you talk about a subcontractor to a large contractor, as Ms. Styles was talking about in her testimony, it just adds more of a burden, more of a problem, more of a cost, and it is going to drive— especially small business, as I said in my testimony, including especially perhaps those owned and run by minorities and women— out of the federal contracting arena. It is a bad idea.

Mr. RUSSELL. I appreciate that.

And, Ms. Styles, given that, if contracts fail to meet cost and timeliness due to the burdens of the executive order, would that be a halt in efficiency and a failure of the best laws to contract?

Ms. STYLES. Absolutely. You know, if you stop getting the performance that you need, there are mechanisms in place to take that contractor out of the whole procurement system.

Mr. RUSSELL. In your view, if that is the case, what is the motivation behind the executive order, if we already have laws, as many of you have testified, to meet this? In your view, what is the motivation behind the executive order if it is not to fix something that is not broken?

Ms. STYLES. I would only be speculating as to the motivation, although I have to say, when I look at the executive order and how it is implemented—so if you have a problem and you want to fix it, like I said, you bring in the plumber to fix the pipe.

If there is a problem here and there isn't enough information going to the suspension and debarment officials, there is a way within the current system to fix it. So I am mystified why you would create a vast bureaucracy to fix something that you already have a well-functioning system to take care of.

Mr. RUSSELL. And, Mr. Soloway, especially with your defense background, given the vital role that contracts play in the defense of our nation, and having been on the receiving end of contracts, or the lack of timely delivery of them while fighting in the field, what impact does the executive order have on our constitutional requirement to provide for the common defense?

Mr. SOLOWAY. Sir, I am going to take a slightly different view on that than Ms. Styles, not to disagree substantively at all, because we share a view on this. And this goes back to Mr. Polis' question about a grinding halt.

I think the biggest danger here is exactly the reverse, is that we are going to have—you have multiple bidders for contracts, as the President himself said, the vast majority of whom are ethical performers, and a red flag, such as Ms. Walter said, comes up on one company, an allegation, something completely unproven, something

completely undocumented but just an allegation or several allegations, or one contract which could have, you know 1,000 violations just because of one mistake, and the contracting officer is going to say—excuse me—contracting officer will say, "I don't have time to deal with this. I am going over here."

That is as much as a danger to the system as the grinding halt, and that is a rush to judgment because there is so much of a pressure to get things done. I think the—what we are missing in this discussion is that the context and the framework set up by the executive order does not require that it be proven to have been, at that moment, a bad actor. It simply looks at, quote, as Ms. Walter put it, "red flags." Well, there are a lot of red flags on this.

Mr. RUSSELL. Well, do you believe, then, you know, given the amount of contracts that our military relies upon for the delivery of their systems, their weaponry, their, in many cases, services—many things, what impact would this executive order have on providing for our common defense?

Mr. SOLOWAY. The biggest impact, according to the experts I have talked to—and I would be glad to get the report for the Committee for the record, because there has been some analysis done on this—is one colleague of mine at a major firm who is—not a defense firm—has analyzed this suggests that this executive order in and of itself could raise the cost of compliance by 20 percent.

In other words, there is now, at most estimates, compliance with federal regulations, they are somewhere in the 20 to 25 percent of every dollar, and in their estimate this could raise it to 30 cents on the dollar. So it could well be a cost impact at a time we are trying to reduce expenses.

Now, that is not to say if it were to achieve its intended outcome that that is not worthwhile. Our view is it won't achieve the intended outcome, so why would we do this?

Mr. RUSSELL. Well, I appreciate that, and hopefully we can get this overturned with the powers of Congress.

And thank you, Mr. Chairman. I yield back my time.

Chairman WALBERG. I thank the gentleman.

Now I recognize the gentlelady from Oregon, Ms. Bonamici.

Ms. BONAMICI. Thank you very much, Mr. Chairman.

And thank you, to our panel of witnesses, for their testimony. This has been a very thought-provoking discussion about an important issue.

My constituents back home in Oregon would be very glad to hear that we are having a hearing to address unfair labor practices by federal contractors. The federal government pays billions of dollars out in federal contracts, and it sounds like we all agree that we should have good policies that hold our contractors accountable for labor standards.

And as members of Congress we should be good stewards of taxpayer dollars, and that means that we need to work together to protect those dollars and protect American workers. And the executive order seeks to do just that, and I look forward to seeing the regulations, as we have all acknowledged do not exist yet.

I want to ask you, Ms. Walter, I am concerned to learn that with the current state of federal contracting, in addition to potentially rewarding companies that have violated labor laws, we might actu-

ally be costing the federal government even more. And you talk about the link between labor law violations and poor contract performance. So if violators are not good business partners we shouldn't keep rewarding them with taxpayer dollars.

So could you elaborate on the connection between labor violations and poor contracting performance and talk about how this executive order could save the government money in the long run? And I do want to save time for one more question.

Ms. WALTER. Certainly. Our report took a look at the universe of contractors that have had the worst labor law violations and said, so what happened to those federal contracts? And what we found is that when contractors continued to receive contracts after they had had these serious violations, there was poor performance. One in four had performance problems.

So, you know, this was a report that looked at a small universe of companies, but if the number of companies is anywhere near that, this should raise a red flag not just in the terms of workers and in terms of law-abiding businesses, but also in terms of taxpayers and taxpayer value.

Ms. BONAMICI. Terrific. Thank you very much.

And I want to follow up on the conversation that Ranking Member Scott was having with you and Mr. Soloway, because it sounded like you acknowledge that there are some current federal contractors, or have been federal contractors, with labor law violations. But then I also hear people saying we have a system that works and so we don't need this executive order.

So do you want to explain, if there are federal contractors with labor law violations, how that is consistent with witnesses saying, "We have a system; we don't need the executive order?"

Mr. SOLOWAY. Of course there are contractors with violations. There are contractors with violations from five years ago or 10 years ago. There are contractors with violations driven by the fact that the government forgot to put the contract clause in to tell them what—that they were subject to the *Service Contract Act* or the *Davis-Bacon Act*.

When you say "violation," this is one of the fundamental problems with the executive order. We are taking the fact of a violation and equating it to intent, whether it is nefarious or administrative.

It is widely accepted in both government and industry—and I am talking about the Department of Labor when I talk, the Wage and Hour Division. We do training on the *Service Contract Act* with the Department of Labor three times a year, and it is widely accepted that there are administrative errors made all the time on both sides. But every one of those errors equates to a violation, so it would be listed as a violation.

So we are using terminology here a little too freely.

Ms. BONAMICI. Understood. I want to ask one more question.

There is some testimony about how a number of states—New York, Minnesota, Massachusetts—have required labor compliance reviews, and there—in fact, it has increased competition in some of those states.

Can you, Mr. Soloway, and then I want to ask Ms. Styles also, how do those differ from the executive order?

Mr. SOLOWAY. I am not familiar with each of the states, but I can tell you that a number of states that have looked at this kind of an approach don't have prevailing wage laws to begin with. Some do, some don't.

Ms. BONAMICI. Ms. Styles?

Ms. STYLES. I think it is an issue of the number of laws that they are reviewing and making certifications to. So you take what we have in the federal government, which is almost 100,000 contract actions over $500,000 every year, then you take what it looks like the executive order is saying with regards to the number of labor violations, the potential violations, and you multiply that by 50.

And so I think it may be that it is simply easier to administer and they have created an easier-to-administer system at the state level.

Ms. BONAMICI. I just want to say, if there is a model for labor compliance reviews that is working and that is increasing competition, that has the potential to make sure that contractors with labor law violations do not get federal contracts, we should be doing that. It is important to preserve taxpayer dollars and make sure that the contractors have a good record on labor laws.

So I look forward to working on this Committee to make sure that we implement the executive order.

And I have a few seconds left. Ms. Walter—

Ms. WALTER. One quick point: Most of these state laws, they are looking at federal law compliance and state law compliance. So they are looking at a myriad of laws.

Ms. BONAMICI. Terrific. Thank you.

Sounds like we have the same goal on mind. I think we can get there.

Thank you, Mr. Chairman. I yield back.

Chairman WALBERG. Thank the gentlelady.

Now I recognize the gentleman from Georgia, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman.

And I feel like I should be down giving testimony. I have been in the contracting business for 37 years and I have to say, we did one job for the federal government and promised our people that we would never do that again. And the reason for it is because of the compliance requirements that I felt like were a total waste of taxpayer money.

Now, how we can continue to add compliance to contracts when—and save taxpayers money, I don't know how that works, but I can tell you, I am a witness to see, you know, some of the things were just maddening, particularly when it comes to the thing about even contractors in the private sector—which we were in business 37 years and, you know, we paid overtime because—not because the law required it, but because it was the right thing to do, for crying out loud.

And I can't imagine a contractor out there who is not paying lawfully overtime. I mean, it just—because there are so many complying agencies that require that reporting, and the opportunities for folks to go and get relief from that sort of thing.

But anyway, since—Mr. Goldsmith, you know, the federal agencies have been found to violate federal labor law, and can you talk about how onerous and expensive compliance regulations imposed

by executive order would drive many employers away from contracting and how this will hurt the taxpayer, as well as the employees who work for them?

Mr. GOLDSMITH. Well, I don't think that there is any question but that the executive order would add significant compliance burdens on potential federal contractors, and as a result, significant cost. And much as you did in your business, I don't doubt that there would be any number of otherwise highly qualified contractors that would choose to exit the federal contracting business because it is just not worth it, on top of every other federal and state and local obligation that they have to meet.

And with respect to overtime, there has been a lot of talk about overtime and the *Fair Labor Standards Act*. I would just like the record to reflect that the *Fair Labor Standards Act* has been around since the mid-1930s and it is the statute that now is the subject of more litigation probably than any other in the labor and employment field because people just don't understand it.

So not paying overtime does not in any way suggest that there is an intent not to pay overtime. It suggests that there is a complexity in a workplace with respect to hours of work and how those hours of work are calculated.

And I think part of the problem with this discussion this morning is that there has been an extraordinary amount of kind of loose talk, in my judgment—that is to say, talking about reports and linkages and severity and willful— without any appreciation of the underlying facts, which actually count in these assessments, as to how that might affect the performance of a contractor.

And so far as I am concerned, there is absolutely no linkage that I am aware of. I have never read a report or a study that is at all credible that suggests that there is a linkage of any sort between a contractor's failure to, in the eyes of a Department of Labor investigator, to not pay overtime properly and that contractor's performance.

It is easy to say; it is not so easy to prove. And I think that is the problem.

We are talking about words, we are talking about contractors, we are talking about facts, and you can't just pull all of this out of context and assume that just because you say it is so, it is so. I don't know what report Ms. Walter was talking about that suggests that there is linkage. I would like to know.

Thank you.

Mr. ALLEN. Thank you, Mr. Goldsmith.

Ms. Styles, your testimony outlines seven new steps that must occur before a contracting officer can award a contract under this new scheme. You also note the new burdensome reporting requirements for both prime and subcontractors. Can you estimate the cost on federal contractors to gather and maintain this information?

Ms. STYLES. I cannot estimate the cost, although it has got to be substantial, particularly in the context of trying to determine if your subcontractor is responsible. I mean, that just is an extraordinary requirement to add to a prime contractor to do that with all of their subcontracts over $500,000.

Mr. ALLEN. How about the cost imposed on the government to ensure contracting officers are reviewing all this information and delays this will cause in the procurement system?

Ms. STYLES. Well, I certainly can't estimate that. It seems like an extraordinary thing to ask our already overburdened contracting officers to go through all these steps, and to put new labor compliance advisors in place to go through all these steps as well.

Mr. ALLEN. Plus the fact they are arbitrary.

Ms. STYLES. Yes. They are very subjective. I will say, they are very subjective.

Mr. ALLEN. Yes.

Mr. Chairman, I yield back my time.

Chairman WALBERG. I thank the gentleman.

Now I recognize the gentleman from Wisconsin, Mr. Pocan.

Mr. POCAN. Thank you very much, Mr. Chairman.

Mr. Allen, you have nine years on me in business. I am 28 years in May, so congratulations to you.

And, you know, I come here as a member of actually three local chambers back home, and I got to tell you, I personally see it very different from a business perspective. I see it from the perspective of what we are actually finding in real application in places like Maryland.

I am more likely to bid on something knowing that I am doing a fair bid, that I am bidding at the same level playing field—not someone who is cutting the corners, not someone who is doing something else. And I do bids with local and state government. Obviously I can't do federal ones because of my job, but we do a lot of local and state.

So I kind of—when I listen to some of the words that have been used about the process—that it is chaos, aggressive regulations, vast bureaucracy, it is going to divert resources, this is a robust process—and when I look at as I understand the process, if I have no labor violations—and by the way, Mr. Chairman, I would have loved to have on this panel—we are lawyered up today, which is great, but I would have loved to have seen some contractors here, perhaps, that—especially contractors maybe that have a violation and not paying overtime, because I would love them to discuss that and why they think they should get another contract of our taxpayer dollars while they are in violation of federal law. I—

Chairman WALBERG. If the gentleman will yield, I would answer that.

Mr. POCAN. Or in a future hearing would be fine, too—

Chairman WALBERG. Well, we mentioned that we would love to have them here, but they were afraid to be in front of the panel.

Mr. POCAN. And, you know, that is a problem, Mr. Chairman, isn't it, right? That alone speaks volumes, that the very contractors who violate the law don't want to come before a Committee to actually speak the truth.

Chairman WALBERG. These were contractors in general who feared retribution.

Mr. POCAN. Well, I am watching all the contractor associations today that came out in support of this because they have got members, hopefully like my business and the people who I belong to at my local chambers who are law-abiding businesses, who want to

compete for contracts fairly but we don't want to compete unfairly when it comes to that.

So my first question, Ms. Walter, what exactly is the process for someone like me? If I have no labor violations and I am competing in this, what does the chaos, aggressive regulations, and diverting of resources I am going to be involved with on a putting something in if I was a federal contractor?

Ms. WALTER. You will check a box.

Mr. POCAN. Let me just try that.

That was the compliance right there?

Ms. WALTER. Yes.

Mr. POCAN. All right. I am going to do it for another business. Yes. I just did it for two businesses who follow the law, right?

Okay, then if I do have something that I can't check the box, does that mean I am automatically banned from being able to be a federal contractor?

Ms. WALTER. Certainly not. It means that the federal government will take a closer look.

Mr. POCAN. And a closer look, so it is not automatic. Instead, it is allowing them to enter a process, if I understand, to perhaps improve the law.

And if they really are a business who just has something that ran a little astray and they are trying to get back in compliance, doesn't this set up a process for them?

Ms. WALTER. There will be a process for that, and there will be a process for contracting officers who are not expert in every single law to look to experts to get some guidance.

Mr. POCAN. And let me just, if I can for a second—Mr. Goldsmith talked about that you had the linkage on the last question. Would you mind addressing that?

Yes, Ms. Walter.

Ms. WALTER. Say it again?

Mr. POCAN. Mr. Goldsmith mentioned that you didn't refer to the linkage. You had it but you didn't—

Ms. WALTER. Oh, I am sorry. The report.

Mr. POCAN. Yes.

Ms. WALTER. The report finds that one in four contractors with these problems also have performance problems. We cannot establish a causal relationship; that would be very difficult.

And we would love to see better data coming out from the government so we could look at a larger universe, but that simply—you know, Mr. Soloway has pointed out that there are opportunities for better data. We fundamentally agree.

Mr. POCAN. Sure. Wasn't there also a New York study, the Fiscal Policy Institute? Could you just talk about that for a second?

Ms. WALTER. Certainly. They found that contractors were—with labor law violations were five times more likely to have performance problems.

And 30 years ago the HUD inspector general actually came to similar results looking at HUD projects, finding that there was an increased performance problems in companies that had workplace law violations. So we were not the first to find this relationship.

Mr. POCAN. Well, and again, Mr. Chairman, that is part of it. As a business owner I want to have a level playing field. I want every business to have that level playing field.

But it becomes an unlevel playing field when someone who can violate the law and, by violating the law, cut some corners, get a better bid, and this is something that I see as pro-small business. And I—certainly I disagree with the lawyer for the Chamber, but as a small business owner, since I had hair, you know, 23 years old starting up a business, that is exactly what I want in place. And that is probably why these contracting organizations want this in place.

And, Mr. Chairman, I hope that if we have another hearing on this if there is a way to compel some of these contractors who have violated the law, I—it would be great to have them in front of us to explain why they think they should still be eligible for federal contracts while they are in violation of safety and labor practices.

I yield back.

Chairman WALBERG. Would the gentleman yield?

Appreciate the time.

Let me just—Mr. Soloway, respond to that if you would, please, because you are the only contractor, as it were, here today.

Mr. SOLOWAY. Mr. Pocan, we are the largest organization of government contractors, professional services, technology firms—large, small, medium-sized—and our members are universally opposed to this not for the reasons you think. They are opposed to it because of the regime it creates and the unfairness it structures.

You are confusing violation with administrative errors, complexity of implementation. So I—it is a much longer conversation, but I think that there is a universal concern amongst our membership.

Chairman WALBERG. I thank the gentleman.

Now I recognize the gentlelady from Massachusetts, Ms. Clark?

Ms. CLARK. Thank you, Mr. Chairman.

And thank you, to all the panelists, for being here today.

My first question is for Ms. Walter. We know that two-thirds of low-wage workers, who are the most vulnerable to poor labor practices, are women. And we know that, according to some estimates, firms that contract with the federal government hire approximately 22 percent of the entire American workforce.

So if we are able, through this executive order, to raise our labor standards, what do you think the effect would be on working women in this country?

Ms. WALTER. Well, I think that, you know, there are plenty of working women here who can tell you their personal stories of what the effect would be to know that they are going to take home a higher paycheck because it is the wages they have earned. Not because we are requiring contractors to raise wages, but because they have worked hard and they are getting the wages they have earned. They have the powerful stories here, and I think that this is the reason why we are here.

Ms. CLARK. And do you think this would have a net effect on pay equity across the country for women?

Ms. WALTER. I would certainly hope so.

Ms. CLARK. Yes.

Mr. Goldsmith, I was caught by part of your written testimony when you were talking about Section 6 of this executive order that bans for, in certain circumstances, compulsory arbitration, pre-dispute arbitration clauses, for sexual assault and sexual harassment. You wrote in your testimony that this encroaches on employers' rights.

I just want to be sure I understand your position and that of the U.S. Chamber. Is it your position that the executive order's prohibition on contracting with companies who require compulsory pre-dispute arbitration of sexual assault and sexual harassment claims should be overturned?

Mr. GOLDSMITH. It is my position that the courts have uniformly permitted employers to require arbitration in connection with all manner of employment disputes, whether it is sex harassment, whether it is race discrimination, whether it is age discrimination, whether it is disability discrimination, whether it is anything else.

That regime has been in place for a long time. It has existed certainly with the sanction of the support of the Supreme Court in the Gilmer Case in 1991, and it continues to exist today.

So to the extent that this executive order suggests that with a contract of over $1 million you cannot have any kind of arbitration process to resolve the employment disputes, it simply flies in the face of volumes and volumes of cases in all—basically all of the circuits. So it is wrong, and it seeks to overturn that.

Ms. CLARK. In basically all of the circuits. There is a 5th Circuit case, right, that has—the Jones versus Halliburton—that did not allow arbitration to cover sexual assault. Is that right?

Mr. GOLDSMITH. I don't know that case. I believe I read it when it came out. I would be happy to read it again and tell you if I agree or not with your assessment of it.

Ms. CLARK. So basically, your position is that pre-dispute arbitration, no matter what the incident, whatever kind of intentional tort may occur in the workplace, is a work-related incident that should be covered under arbitration. Is that right?

Mr. GOLDSMITH. Well, that begs the question of intentional tort. It is absolutely common throughout businesses large and small in the United States to have a regime in place where there is an arbitration process to resolve all manner of workplace disputes.

If there is an intentional tort—I am not sure exactly what you mean by that, but if there is an intentional tort, you know, the punitive plaintiff may have other opportunities and there may be ways in which that punitive plaintiff can circumvent the arbitration clause. But as a general proposition, there is no question in my mind—none—that this provision in the executive order that seeks to preclude employers from having pre-dispute arbitration to resolve employment disputes for those contracting in excess of $1 million flies in the face of the overwhelming majority of courts'—district courts, courts of appeals, and the United States Supreme Court—decisions.

Ms. CLARK. Can you think of an example where a sexual assault in the workplace would not be an intentional tort?

Mr. GOLDSMITH. I don't know what—this is why I say facts matter. I don't know what you mean by "sexual assault." You know, there are plaintiff's lawyers who have all manner of theories about

what is and isn't sexual harassment, sex discrimination, sexual assault.

If you give me the facts, I will be happy to take a—I will be happy to give you my thoughts. But I don't know what you mean by "sexual assault."

Ms. CLARK. I see my time has expired.

Chairman WALBERG. I thank the gentlelady.

Now I recognize the gentleman from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you—

Chairman WALBERG. Did I get close to that?

Mr. DESAULNIER. I get asked that every time a chair—

Chairman WALBERG. That was my first opportunity to say it.

Mr. DESAULNIER. Anything close, with a name like mine, I will respond.

I want to associate my comments with both Mr. Allen and Mr. Pocan, as somebody who spent somewhere around the same period of time owning businesses and is still responsible for businesses.

Mr. Soloway, you said in your testimony—I am reading from it: Logically, it is unfair for contractors with repeated, willful, and pervasive violations of labor laws to gain competitive advantage over the vast majority of contractors who are acting diligently and responsibly to comply with complex web of labor requirements.

So in my previous elected office in California we did a lot of work around the underground economy and found that the contractors and the employers who violated labor laws were also violating health and human service—health and safety laws. So my question to you is—and we also found that some of the things that you suggested and Mr. Goldsmith suggested from our chamber was true, that for a small business, which I was one, although never dealt very much with the government directly on contracts, that they needed more help getting through it.

So two-part question: I am assuming that all of us want to get rid of the bad actors, the ones that, in my perspective, sometimes take a fairly sophisticated risk management approach to whether they are going to get caught or not, and then also sort of take the fines as a cost of doing business.

So knowing that your members, most of them, are doing the right thing, what are you doing first to educate smaller members so they don't get those administrative violations? And secondly, what are you doing to make sure that most of your members—I think you would have a political problem if you weren't being aggressive to those people were repeatingly, as you suggest, have an unfair competition?

Mr. SOLOWAY. We spend a great deal of time internally on this. As I said earlier, three times a year we conduct major training on the *Service Contract Act*, which is the principal of the prevailing wage laws, I mean, that affect our membership, because we are on the services and technology side.

We do training in partnership with the Department of Labor Wage and Hour Division on the *Service Contract Act*. We sell out every single course, and it is an enormous mix of small, medium, and large companies because everybody faces the same complexity.

We have done numerous programs on government ethics requirements, government compliance requirements. If I went through for

you the list of compliance requirements that a government—a federal government contractor would have to face, I could be fairly certain that there would be very few states in the country that would match the list, although California has some fairly—has recently put in place some new laws.

But the second thing I would say—and I just want to urge the committee to keep this in mind: When we talk about the biggest violators of these laws—and one example that was used was KBR as a—one of the major violators, at $1 million in either misclassified or wage theft or whatever term you want to use, that is against the baseline of billions, literally, with a "b," in salaries they were paying over that period of time.

So I am not excusing the $1 million. I don't know if it was intentional, if it was a technical error or an administrative error, but does that make it a pervasive problem just because the number sounds big? You could have a small business that has 10 people that it underpaid and it might be half their workforce.

So you have to be really careful. These numbers are being thrown around today that are—that really—the interconnectivity is not at all clear.

But to answer your question, we spend an inordinate amount of time as an organization, and I think it is fair to say Ms. Styles and Mr. Goldsmith and their firms spend an inordinate amount of time with their clients trying to coach them through what is an incredible complex thicket.

Mr. DESAULNIER. Have you found clients that had a pattern of avoiding labor laws that you no longer—you refuse to—

Mr. SOLOWAY. The ones that I am aware of that have actually had a pattern of willful abuse of labor—or other laws, by the way—have been suspended or debarred, and many of them have gone out of business. And some of them, of course, come back because they have taken remedial action.

Mr. DESAULNIER. Have you ever found any of your clients—

Mr. SOLOWAY. I am sorry?

Mr. DESAULNIER. Have you ever found any of your clients to do that, and have you taken action to—

Mr. SOLOWAY. I don't have a legal authority to take action. I am not quite sure what I would—

Mr. DESAULNIER. Well, just, if you think there is a law being violated do you have a legal obligation to tell the authorities? Have you ever had occasion to do that?

Mr. SOLOWAY. I wouldn't have that kind of knowledge, personally.

Mr. DESAULNIER. Okay.

Mr. Goldsmith, similar, the Chamber we found in California that a lot of it was actually education, so the Chamber and NFIB actually spent money trying to help people. Have you done the same thing?

Mr. GOLDSMITH. Absolutely. Our clients, especially our larger clients—have large and highly skilled human resources staffs who spend virtually all of their time in training their direct reports, and their direct reports training—

Mr. DESAULNIER. Mr. Goldsmith, I am going to take that as a yes. I appreciate it.

Ms. Walter, we have talked about overreach. Do you have any opinions on under-reach by previous administrations when it comes to enforcement of compliance laws?

Ms. WALTER. Well, I think our—currently we are under-reaching. We have responsibility compliance laws.

I think the other panelists have focused on, well, we have suspension and debarment. Well, we also in our regulations have responsibility provisions because we want to uphold high standards, we want to protect taxpayer dollars.

Companies are already required to report into a database. They are already required to update that information every six months. They are already responsible for their subcontractors.

But the system is not working. It is not working because they are not reporting what is important. And the system is not working because contracting offices don't have analysis about what is important, and they don't have guidance, and they don't have the technical expertise they need that this new order will help institute.

Mr. DESAULNIER. Thank you.

Chairman WALBERG. Thank you. Time is expired.

I recognize the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chair.

And I want to thank the witnesses for their presence and testimony here today.

Think I will begin, Mr. Goldsmith, by just picking up on the previous line of questioning from my colleague, Representative Clark. I think you indicated that you are concerned with the inclusion of the pre-dispute arbitration category as a criteria, correct?

Mr. GOLDSMITH. That is correct.

Mr. JEFFRIES. And you have indicated, I believe, that courts have concluded in large parts of the country, although there is some dispute as to the 5th Circuit's perspective on this, that pre-arbitration clauses are permissible. True?

Mr. GOLDSMITH. Correct.

Mr. JEFFRIES. But I think that there is a distinction between what is permissible and what there is a right to do. And is it your position that employers and contractors have an absolute right to mandate that their employees sign off on a pre-dispute arbitration clause?

Mr. GOLDSMITH. I am not sure I understand the distinction between an absolute right and a right, but it is certainly well-established in the law that employers can insist upon, if you will, a pre-dispute arbitration provision.

Mr. JEFFRIES. Right. The dispute is not between—

Mr. GOLDSMITH. It has been the law for a long time.

Mr. JEFFRIES. The dispute is not between an absolute right and a right. The dispute is between the opportunity to do something that is lawful and whether you have an absolute right to.

You have an absolute right not to be discriminated against, but you don't necessarily have an absolute right to secure certain contracting opportunities from the federal government, correct?

Mr. GOLDSMITH. And I think that is true. I agree with that.

Mr. JEFFRIES. So then it is not clear to me how you can take issue in the context of a duly elected President's administration, elected twice, coming to the public policy conclusion that it is not

necessarily appropriate in certain instances to mandate that employers require pre-dispute arbitration.

Let me turn to—

Mr. GOLDSMITH. May I respond to that?

Mr. JEFFRIES. Yes, certainly.

Mr. GOLDSMITH. I mean, the problem with that is that it is not the President's call; it is Congress' call. And it is especially the case when you are talking about well-established legal precedent.

And I would also suggest that to the extent that a provision like that exists in this executive order, which, as I said, you know, can't be tweaked to be saved, that is going to discourage employers—large employers—from the federal contracting space, which can't be a good thing for the country or the taxpayers.

Mr. JEFFRIES. Is there any evidence, Ms. Walter, to suggest that the interest in federal contracting opportunities, which can be pretty lucrative in this country—we are talking about hundreds of billions of dollars, presumably, each and every year, if not more—is there any evidence to suggest that the interest or the lines will dry up because of this executive order that has been put in place?

Ms. WALTER. None that I have seen. I have addressed the state examples of states instituting these sorts of provisions. I am not familiar and I am not as familiar with the pre-arbitration requirements being instituted at the state level, but efforts at the state level to uphold higher responsibility levels among contractors have been met with either what we have seen as no change or actually increasing levels of competition.

Mr. JEFFRIES. And it seems to me that this executive order is designed to promote at least three values that I think should be important to the Congress and to the American people—you know, protect employees from harmful conditions at the workplace, protect taxpayers from the integrity of these contracting opportunities to ensure that those that receive the opportunity to contract with the federal government are deserving within the framework of law and statute that already exists, and then, of course, just to make sure that any business benefitting from taxpayer dollars are, in fact, law-abiding.

I mean, does this strike you as the intent and the goal of the executive order, and are these worthy goals?

Ms. WALTER. Certainly. And it is continuing further down the path of what Congress did when it enacted the contractor responsibility database, where it is trying to uphold higher standards among contractors to protect taxpayers.

Mr. JEFFRIES. Are you aware of anything in law, statute, common law, Supreme Court jurisprudence, the Constitution, that provides an absolute right to contractors in America to federal contracting opportunities? Is it a right or is it just an opportunity within the parameters of what is established by the Congress, the administration, or both?

Ms. WALTER. What has been established by Congress is that you have to be considered responsible in order to receive a federal contract. There hasn't been good definitions about what that means, in terms of business integrity, to date.

All this does is add to that definition so that contracting officers can make an informed decision.

Mr. JEFFRIES. Thank you, Mr. Chair. I yield back.

Chairman WALBERG. I thank the gentleman.

And now I recognize a member who is not a member of this subcommittee but has a interest in it, and we are delighted to have him here, the gentleman from Arizona, Mr. Grijalva.

Mr. GRIJALVA. Thank you very much, Mr. Chairman, and for your courtesy in allowing me to participate in this meeting.

And thank you, to the witnesses.

We have talked a lot about the impact of the executive order on the function of business and the function of federal contractors. There is a concurent effect as well, and that is the effect on workers that have been affected by wage theft and have been affected by a process currently in the Department of Labor where the authority doesn't exist for disbarment or for the compliance issues that the executive order is bringing up.

Antonio Banejas, from my district, who is not here in D.C., came in 2010 and worked until May 2013 at the Reagan Building at a fast-food establishment. He did everything—cooked, cleaned, handled the register. And he was working over 60 hours a week and not being paid overtime.

Antonio and others stood up to complain and to use their collective voice to say, "We need fair labor practices here and we need to be paid for what we work." The consequence of that is Antonio was then turned over to Immigration by the business; he was detained for four days, released, and now two years later that wage theft complaint is still waiting to be resolved. The executive order means to expedite that.

And I should—my friend, Mr. Ellison, left, and through his leadership, on four separate occasions Congress approved an amendment either by voice or by roll call that essentially has the outlines of the content of the executive order on wage theft and what—and disbarring businesses who do that. Four times, including—all appropriations bills, and including the appropriations for the Department of Defense, where those are the big contractors.

Department of Labor is a smaller player, other departments smaller player. The Departments of Defense and Homeland Security are the big contracting players, and I mention that because if I may, Mr. Soloway, ask you a question—Raytheon-Abouie, through their subcontractors you have a bad actor in violation of current law, wage law, in violation of other issues.

That big actor that gets hundreds and hundreds of millions of dollars of contract work—essential work for the Department of Defense—their responsibility without this executive order to police, for lack of a better word, and assure that their subs are treating their employees in a fair way, consistent with the current law, how does that happen if there is no accountability to the big contractor to essentially make sure that none all the way down the hundreds of millions of workers are not being shortchanged or abused in the workplace?

Mr. SOLOWAY. They can have, under current law, tremendous responsibility for that. I have to go back to the premise of the statement, sir, because I think several of you—

Mr. GRIJALVA. Well, but—

Mr. SOLOWAY. I am going to answer your question. I understand. But—

Mr. GRIJALVA. Chairman was courteous enough to give me a few minutes.

Mr. SOLOWAY. I think the answer is that this rule, or this proposed executive order and the proposed rule that will implement it, doesn't change current policy.

But you made the comment that you—that the Department of Labor doesn't currently have the authority. It has all the authorities it needs. The length of time to adjudicate whatever is happening at the Reagan Center, which has not yet been adjudicated, which is indefensible, that length of time, doesn't get changed and expedited by this executive order.

What this executive order does is open the door to expedition by saying, "Okay, well if you have been alleged or you have had several violations you are bad." That is a whole different standard.

Mr. GRIJALVA. Ms. Walter, to the point that the gentleman is making, if there is such a mechanism—a functioning mechanism to disbar and suspend contractors, why is this whole executive order needed then?

Ms. WALTER. Well, I mean, I think the executive order is about present responsibility. So we are talking about is the contractor responsible in the present tense?

And so if there are warning signals that they are—they may not be responsible, it is something that the government should take a closer look at.

Mr. GRIJALVA. Thank you. And I think you have made that point over and over again. I think the executive order does that—shed light, and in the present tense—and thank you for that phrase—to begin to create some balance between the interests of the workers and the interests of the contractor.

With that, Mr. Chairman, again, thank you for your courtesy, and I yield back.

Chairman WALBERG. I thank the gentleman.

And now I recognize the Ranking Member, Ms. Wilson from Florida, for closing statements.

Ms. WILSON of Florida. Thank you, Mr. Chair.

I would like to thank all of our witnesses for testifying and answering our questions today.

And I want to thank the workers for attending this hearing and for your attention, and we appreciate all that you do and appreciate that you are here with us.

President Obama's *Fair Pay and Safe Workplaces Executive Order* has widespread support in the public and private sectors. The executive order lays out ways that the Department of Labor can provide compliance assistance or remedial measures to contractors who are struggling to adhere to labor laws.

I personally believe that this is more than fair. Our nation's children can fail, according to federal standards, after a single assessment. They call it high stakes. Yet government contractors are given chance after chance to receive multimillion dollar contracts while continuing to blatantly abuse labor laws.

Last year the Miami Herald and McClatchy newspapers conducted a year-long investigation in Florida and 27 other states and

found that unethical contractors worked on taxpayer-funded building projects even as they ignored labor laws and avoided paying state and federal taxes. This is a no-brainer.

If you want to do business with the federal government, you must obey federal laws. It is critical that we support law-abiding companies, that we support our workforce, and that we eliminate inefficiency and waste in government. This will lead to a stronger, healthier, and more productive nation.

This executive order will improve the lives of millions of workers, helping to ensure they have access to fair pay, benefits, and safe working conditions. For those who suggest that this process will be too burdensome, there is a simple solution: Comply with the law. Comply with the law.

If you comply with the law you can check the box indicating that there are no violations and that your company wants to uphold high standards.

I would like to enter the following documents into the record under unanimous consent: the President's Executive Order on Fair Pay and Safe Workplaces; letters from 68 women's organizations; the Leadership Conference on Civil and Human Rights; and the Campaign for Quality Construction in support of the Fair Pay and Safe Workplaces Executive Order; Center for American Progress—"At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers;" Government Accountability Office—"Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors;" and Senate HELP Committee report—"Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk;" McClatchy newspapers—"For Florida Companies That Play By the Rules, Success is as Tough as Nails."

[The information follows:]

45309

Federal Register
Vol. 79, No. 150
Tuesday, August 5, 2014

Presidential Documents

Title 3—

The President

Executive Order 13673 of July 31, 2014

Fair Pay and Safe Workplaces

By the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 121, and in order to promote economy and efficiency in procurement by contracting with responsible sources who comply with labor laws, it is hereby ordered as follows:

Section 1. *Policy.* This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws. Labor laws are designed to promote safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies (agencies) to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance.

Sec. 2. *Compliance with Labor Laws.* (a) Pre-award Actions. (i) For procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds $500,000, each agency shall ensure that provisions in solicitations require that the offeror represent, to the best of the offeror's knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor, rendered against the offeror within the preceding 3-year period for violations of any of the following labor laws and Executive Orders (labor laws):

(A) the Fair Labor Standards Act;

(B) the Occupational Safety and Health Act of 1970;

(C) the Migrant and Seasonal Agricultural Worker Protection Act;

(D) the National Labor Relations Act;

(E) 40 U.S.C. chapter 31, subchapter IV, also known as the Davis-Bacon Act;

(F) 41 U.S.C. chapter 67, also known as the Service Contract Act;

(G) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);

(H) section 503 of the Rehabilitation Act of 1973;

(I) 38 U.S.C. 3696, 3698, 3699, 4214, 4301–4306, also known as the Vietnam Era Veterans' Readjustment Assistance Act of 1974;

(J) the Family and Medical Leave Act;

(K) title VII of the Civil Rights Act of 1964;

(L) the Americans with Disabilities Act of 1990;

(M) the Age Discrimination in Employment Act of 1967;

(N) Executive Order 13658 of February 12, 2014 (Establishing a Minimnm Wage for Contractors); or

(O) equivalent State laws, as defined in guidance issued by the Department of Labor.

(ii) A contracting officer, prior to making an award, shall, as part of the responsibility determination, provide an offeror with a disclosure pursuant to section 2(a)(i) of this order an opportunity to disclose any steps taken to correct the violations of or improve compliance with the labor laws listed in paragraph (i) of this subsection, including any agreements entered into with an enforcement agency. The agency's Labor Compliance Advisor, as defined in section 3 of this order, in consultation with relevant enforcement agencies, shall advise the contracting officer whether agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters.

(iii) In consultation with the agency's Labor Compliance Advisor, contracting officers shall consider the information provided pursuant to paragraphs (i) and (ii) of this subsection in determining whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics, after reviewing the guidelines set forth by the Department of Labor and consistent with any final rules issued by the Federal Acquisition Regulatory (FAR) Council pursuant to section 4 of this order.

(iv) For any subcontract where the estimated value of the supplies acquired and services required exceeds $500,000 and that is not for commercially available off-the-shelf items, a contracting officer shall require that, at the time of execution of the contract, a contractor represents to the contracting agency that the contractor:

(A) will require each subcontractor to disclose any administrative merits determination, arbitral award or decision, or civil judgment rendered against the subcontractor within the preceding 3-year period for violations of any of the requirements of the labor laws listed in paragraph (i) of this subsection, and update the information every 6 months; and

(B) before awarding a subcontract, will consider the information submitted by the subcontractor pursuant to subparagraph (A) of this paragraph in determining whether a subcontractor is a responsible source that has a satisfactory record of integrity and business ethics, except for subcontracts that are awarded or become effective within 5 days of contract execution, in which case the information may be reviewed within 30 days of subcontract award.

(v) A contracting officer shall require that a contractor incorporate into subcontracts covered by paragraph (iv) of this subsection a requirement that the subcontractor disclose to the contractor any administrative merits determination, arbitral award or decision, or civil judgment rendered against the subcontractor within the preceding 3-year period for violations of any of the requirements of the labor laws listed in paragraph (i) of this subsection.

(vi) A contracting officer, Labor Compliance Advisor, and the Department of Labor (or other relevant enforcement agency) shall be available, as appropriate, for consultation with a contractor to assist in evaluating the information on labor compliance submitted by a subcontractor pursuant to paragraph (v) of this subsection.

(vii) As appropriate, contracting officers in consultation with the Labor Compliance Advisor shall refer matters related to information provided pursuant to paragraphs (i) and (iv) of this subsection to the agency suspending and debarring official in accordance with agency procedures.

(b) Post-award Actions. (i) During the performance of the contract, each agency shall require that every 6 months contractors subject to this order update the information provided pursuant to subsection (a)(i) of this section and obtain the information required pursuant to subsection (a)(v) of this section for covered subcontracts.

(ii) If information regarding violations of labor laws is brought to the attention of a contracting officer pursuant to paragraph (i) of this subsection, or similar information is obtained through other sources, a contracting officer shall consider whether action is necessary in consultation with the agency's Labor Compliance Advisor. Such action may include agreements requiring appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations, as well as remedies such as decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official.

(iii) A contracting officer shall require that if information regarding violations of labor laws by a contractor's subcontractor is brought to the attention of the contractor pursuant to subsections (a)(iv), (v) or (b)(i) of this section or similar information is obtained through other sources, then the contractor shall consider whether action is necessary. A contracting officer, Labor Compliance Advisor, and the Department of Labor shall be available for consultation with a contractor regarding appropriate steps it should consider. Such action may include appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations.

(iv) The Department of Labor shall, as appropriate, inform contracting agencies of its investigations of contractors and subcontractors on current Federal contracts so that the agency can help the contractor determine the best means to address any issues, including compliance assistance and resolving issues to avoid or prevent violations.

(v) As appropriate, contracting officers in consultation with the Labor Compliance Advisor shall send information provided pursuant to paragraphs (i)–(iii) of this subsection to the agency suspending and debarring official in accordance with agency procedures.

Sec. 3. *Labor Compliance Advisors.* Each agency shall designate a senior agency official to be a Labor Compliance Advisor, who shall:

(a) meet quarterly with the Deputy Secretary, Deputy Administrator, or equivalent agency official with regard to matters covered by this order;

(b) work with the acquisition workforce, agency officials, and agency contractors to promote greater awareness and understanding of labor law requirements, including recordkeeping, reporting, and notice requirements, as well as best practices for obtaining compliance with these requirements;

(c) coordinate assistance for agency contractors seeking help in addressing and preveuting labor violations;

(d) in consultation with the Department of Labor or other relevant enforcement agencies, and pursuant to section 4(b)(ii) of this order as necessary, provide assistance to contracting officers regarding appropriate actions to be taken in response to violations identified prior to or after contracts are awarded, and address complaints in a timely manner, by:

(i) providing assistance to contracting officers and other agency officials in reviewing the information provided pursuant to sections 2(a)(i), (ii), and (v) and 2(b)(i), (ii), and (iii) of this order, or other information indicating a violation of a labor law, so as to assess the serious, repeated, willful, or pervasive nature of any violation and evaluate steps contractors have taken to correct violations or improve compliance with relevant requirements;

(ii) helping agency officials determine the appropriate response to address violations of the requirements of the labor laws listed in section 2(a)(i) of this order or other information indicating such a labor violation (particularly serious, repeated, willful, or pervasive violations), including agreements requiring appropriate remedial measures, decisions not to award a contract or exercise an option on a coutract, contract termiuation, or referral to the agency suspending and debarring official;

(iii) providing assistance to appropriate agency officials in receiving and responding to, or making referrals of, complaints alleging violations by

agency contractors and subcontractors of the requirements of the labor laws listed in section 2(a)(i) of this order; and

(iv) supporting contracting officers, suspending and debarring officials, and other agency officials in the coordination of actions taken pursuant to this subsection to ensure agency-wide consistency, to the extent practicable;

(e) as appropriate, send information to agency suspending aud debarring officials in accordauce with agency procedures;

(f) consult with the agency's Chief Acquisition Officer and Senior Procurement Executive, and the Department of Labor as necessary, in the development of regulations, policies, and guidance addressing labor law compliance by contractors and subcontractors;

(g) make recommendations to the agency to strengthen agency management of contractor compliance with labor laws;

(h) publicly report, on an annual basis, a summary of agency actions taken to promote greater labor compliance, including the agency's response pursuant to this order to serious, repeated, willful, or pervasive violations of the requirements of the labor laws listed in section 2(a)(i) of this order; and

(i) participate in the interagency meetings regularly convened by the Secretary of Labor pursuant to section 4(b)(iv) of this order.

Sec. 4. *Ensuring Government-wide Consistency.* In order to facilitate Government-wide consistency in implementing the requirements of this order:

(a) to the extent permitted by law, the FAR Council shall, in consultation with the Department of Labor, the Office of Management and Budget, relevant enforcement agencies, and contracting agencies, propose to amend the Federal Acquisition Regulation to identify considerations for determining whether serious, repeated, willful, or pervasive violations of the labor laws listed in section 2(a)(i) of this order demonstrate a lack of integrity or business ethics. Such considerations shall apply to the integrity and business ethics determinations made by both contracting officers and contractors pursuant to this order. In addition, such proposed regulations shall:

(i) provide that, subject to the determination of the agency, in most cases a single violation of law may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation;

(ii) ensure appropriate consideration is given to any remedial measures or mitigating factors, including any agreements by contractors or other corrective action taken to address violations; and

(iii) ensure that contracting officers and Labor Compliance Advisors send information, as appropriate, to the agency suspendiug and debarring official, in accordance with agency procedures.

(b) the Secretary of Labor shall:

(i) develop guidance, in cousultation with the agencies responsible for enforcing the requirements of the labor laws listed in section 2(a)(i) of this order, to assist agencies in determining whether administrative merits determinations, arbitral awards or decisinns, or civil judgments were issued for serious, repeated, willful, or pervasive violations of these requirements for purposes of implementation of any final rule issued by the FAR Council pursuant to this order. Such guidance shall:

(A) where available, incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful; and

(B) where no statutory standards exist, develop standards that take into account:

(1) for determining whether a violation is "serious" in nature, the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with

regard to the violation, and other considerations as the Secretary finds appropriate;

(2) for determining whether a violation is "repeated" in nature, whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years;

(3) for determining whether a violation is "willful" in nature, whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the labor laws listed in section 2(a)(i) of this order; and

(4) for determining whether a violation is "pervasive" in nature, the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity;

(ii) develop processes:

(A) for Labor Compliance Advisors to consult with the Department of Labor in carrying out their responsibilities under section 3(d) of this order;

(B) by which contracting officers and Labor Compliance Advisors may give appropriate consideration to determinations and agreements made by the Department of Labor and other agencies; and

(C) by which contractors may enter into agreements with the Department of Labor or other enforcement agency prior to being considered for contracts.

(iii) review data collection requirements and processes, and work with the Director of the Office of Management and Budget, the Administrator for General Services, and other agency heads to improve those processes and existing data collection systems, as necessary, to reduce the burden on contractors and increase the amount of information available to agencies;

(iv) regularly convene interagency meetings of Labor Compliance Advisors to share and promote best practices for improving labor law compliance; and

(v) designate an appropriate contact for agencies seeking to consult with the Department of Labor pursuant to this order;

(c) the Director of the Office of Management and Budget shall:

(i) work with the Administrator of General Services to include in the Federal Awardee Performance and Integrity Information System information provided by contractors pursuant to sections 2(a)(i) and (ii) and 2(b)(i) of this order, and data on the resolution of any issues related to such information; and

(ii) designate an appropriate contact for agencies seeking to consult with the Office of Management and Budget pursuant to this order;

(d) the Administrator of General Services, in consultation with other relevant agencies, shall develop a single Web site for Federal contractors to use for all Federal contract reporting requirements related to this order, as well as any other Federal contract reporting requirements to the extent practicable;

(e) in developing the guidance pursuant to subsection (b) of this section and proposing to amend the Federal Acquisition Regulation pursuant to subsection (a) of this section, the Secretary of Labor and the FAR Council, respectively, shall minimize, to the extent practicable, the burden of complying with this order for Federal contractors and subcontractors and in particular small entities, including small businesses, as defined in section 3 of the Small Business Act (15 U.S.C. 632), and small nonprofit organizations; and

(f) agencies shall provide the Administrator of General Services with the necessary data to develop the Web site described in subsection (d) of this section.

Sec. 5. *Paycheck Transparency.* (a) Agencies shall ensure that, for contracts subject to section 2 of this order, provisions in solicitations and clauses in contracts shall provide that, in each pay period, contractors provide all individuals performing work under the contract for whom they are required to maintain wage records under the Fair Labor Standards Act; 40 U.S.C. chapter 31, snbchapter IV (also known as the Davis-Bacon Act); 41 U.S.C. chapter 67 (also known as the Service Contract Act); or equivalent State laws, with a document with information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay. Agencies shall also require that contractors incorporate this same requirement into subcontracts covered by section 2 of this order. The document provided to individuals exempt from the overtime compensation requirements of the Fair Labor Standards Act need not include a record of hours worked if the contractor informs the individuals of their overtime exempt status. These requirements shall be deemed to be fulfilled if the contractor is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required by this subsection.

(b) If the contractor is treating an individual performing work under a contract or subcontract subject to subsection (a) of this section as an independent contractor, and not an employee, the contractor must provide a document informing the individual of this status.

Sec. 6. *Complaint and Dispute Transparency.* (a) Agencies shall ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds $1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise. Agencies shall also require that contractors incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds $1 million.

(b) Subsection (a) of this section shall not apply to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

(c) A contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall not apply with respect to:

(i) employees who are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; or

(ii) employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor or subcontractor bidding on a contract covered by this order, except that a contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall apply if the contractor or subcontractor is permitted to change the terms of the contract with the employee or independent contractor, or when the contract is renegotiated or replaced.

Sec. 7. *Implementing Regulations.* In addition to proposing to amend the Federal Acquisition Regulation as required by section 4(a) of this order, the FAR Council shall propose such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order, including sections 5 and 6, and shall issue final regulations in a timely fashion after considering all public comments, as appropriate.

Sec. 8. *Severability.* If any provision of this order, or applying such provision to any person or circumstauce, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

Sec. 9. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an agency or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 10. *Effective Date.* This order shall become effective immediately and shall apply to all solicitations for contracts as set forth in any final rule issued by the FAR Council under sections 4(a) and 7 of this order.

THE WHITE HOUSE,
July 31, 2014.

[FR Doc. 2014–18561
Filed 8–4–14; 8:45 am]
Billing code 3295–F4

The Leadership Conference on Civil and Human Rights

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20006

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February 25, 2015

The Leadership Conference

Support The Fair Pay and Safe Workplaces Executive Order

Dear Chair Kline, Ranking Member Scott, and Members of the Committee:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we urge you to protect The Fair Pay and Safe Workplaces Executive Order against any attempts to diminish or undermine it. We believe the executive order will improve the lives of millions of workers—helping to ensure they have access to fair pay, benefits, and working conditions.

The Department of Labor estimates that there are roughly 24,000 businesses with federal contracts, employing about 28 million workers—at least 20 percent of the civilian workforce. By cracking down on federal contractors that break the law, this executive order will help ensure that all hardworking Americans get the fair pay and safe workplaces they deserve. By requiring that an employer's workplace violations be taken into consideration when the government awards federal contracts, it will no longer be acceptable to award federal contracts to companies that routinely violate workplace health and safety protections, engage in age, disability, race, and sex discrimination or withhold wages, and other labor violations.

We are also pleased the executive order will help contractors comply with workplace protections. Companies with labor law violations may receive early guidance on whether those violations are problematic and will have an opportunity to remedy those problems. Contracting officers will take these steps into account before awarding a contract and ensure the contractor is living up to the terms of its agreement.

The executive order will also limit the use of forced arbitration clauses involving disputes arising from Title VII and tort claims related to sexual assault and sexual harassment. This is a key advance in safeguarding workplace rights. In general, forced arbitration makes dozens of antidiscrimination laws unenforceable in court, allowing employers to circumvent civil rights and labor laws intended to protect people from employment discrimination.

The executive order is a common sense measure that will make our contracting system fairer and ensure that companies receiving taxpayer-funded contracts provide basic wage and workplace standards. It has broad public support. A recent survey conducted by Hart Research found that 71% of voters, including 69% of independent voters, favor an executive

The Leadership Conference

order that requires government agencies to review the record of companies that want federal contracts, to ensure these companies have not violated labor and employment laws.

We urge you to support the strong protections afforded by the executive order. If you have any questions, please contact Legal Director Lisa Bornstein at 202-263-2856 or bornstein@civilrights.org.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

CAMPAIGN FOR QUALITY CONSTRUCTION (COMPRISES):
FCA INTERNATIONAL (FCA)
INTERNATIONAL COUNCIL OF EMPLOYERS OF BRICKLAYERS AND ALLIED CRAFTWORKERS (ICE)
MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA (MCAA)
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION (NECA)
SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION (SMACNA)
THE ASSOCIATION OF UNION CONSTRUCTORS (TAUC)

Statement in Support of the Fair Pay and Safe Workplaces Executive Order 13673

On the Hearing of the House Education and Workforce Committee, Subcommittees on Workforce Protections and Health, Employment, Labor and Pensions

"The Blacklisting Executive Order: Rewriting Federal Labor Policies through Executive Fiat"

Thursday, February 26, 2015
Room 2175 Rayburn House Office Building

CAMPAIGN FOR QUALITY CONSTRUCTION (COMPRISES):
FCA INTERNATIONAL (FCA)
INTERNATIONAL COUNCIL OF EMPLOYERS OF BRICKLAYERS AND ALLIED CRAFTWORKERS (ICE)
MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA (MCAA)
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION (NECA)
SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION (SMACNA)
THE ASSOCIATION OF UNION CONSTRUCTORS (TAUC)

Statement in Support of the Fair Pay and Safe Workplaces Executive Order 13673

The FCA International (FCA), the International Council of Employers of Bricklayers and Allied Craftworkers (ICE), the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), and The Association of Union Constructors (TAUC) allied together as the Campaign for Quality Construction (CQC) all support the goals Administration's Fair Pay and Safe Workplaces Executive Order 13673 (EO) in virtually all respects. We have several suggestions for administrative implementation improvements set out below. CQC's purpose is to work with Congress and the regulatory agencies to achieve a workable set of procedures to achieve the laudable goals of the EO, raising the qualification standards in the Federal market and attracting back in top quality performers. CQC acknowledges the added complexity of the pre-award eligibility screening procedures, but supports the judgment that the aims of the policy are worthy of exploring and implementing new and innovative approaches to improve Federal market performance.

The six specialty construction employer associations in our Campaign for Quality Construction (CQC) coalition represent more than 20,000 specialty construction employers, which perform large scope construction projects in public and private construction markets nationwide. CQC firms operate as both prime contractors and subcontractors on commercial, institutional and industrial facility projects of all types, performing mechanical, electrical, plumbing, sheet metal, steel erection, equipment and tool installation, and painting and interior finishing aspects of all those types of projects. CQC members operate both as prime contractors and subcontractors on direct Federal construction projects for the full range of Federal Defense and Civilian agencies. CQC employers employ the full range of skilled construction civil and building construction craft workers, including painters, plumbers, pipe fitters, hvac technicians, electricians, sheet metal workers, iron workers, boilermakers, bricklayers, cement masons, as well as carpenters, laborers, and equipment operators. Employment relations with these skilled crafts are governed through use of multiemployer collective bargaining agreements, both national and local, which also include health and welfare, defined benefit pension, and joint apprenticeship and training programs building and maintaining the high skill production craft base in the industry overall.

Background: MCAA provided input on EO 13673 to the Administration at the Listening Session held on September 2, 2014, as well as written comments to the Administration prior to that meeting. The bulk of this statement focuses on implementation of the prime and subcontractor legal compliance review procedures. At the conclusion CQC will offer summary comments on other aspects of EO 13673.

Bottom line: CQC respectfully contests the title of the hearing – "blacklisting" is pejorative. CQC suggests this title as a better description of EO 13673: ***"Serving the taxpayers well with improved Federal contract economy, efficiency, and performance through more discerning and uniform Federal prime contractor ond subcontroctor selection procedures."*** The EO provides more complete and uniform prime contractor and subcontractor protections in the responsibility determination process than are currently available under current Federal Acquisition Regulation (FAR) screening procedures under FAR Part 9. Employers – primes and subs have more rights, remedies and redress for non-responsibility determinations based on lack of integrity or business ethics under the EO than the current FAR procedures allow. If implemented as suggested below, the EO procedures will offer even greater protections, and thereby immeasurably improve the responsibility determination process for the benefit of agency construction programs, the taxpayers, and legally compliant prime contractors and subcontractors.

The EO is sound public contract administration proprietary policy - CQC also looks forward to working closely with the Congress in this hearing and the Administration in designing implementing regulations that achieve the full intended benefits of the Order for contracting agencies and their construction projects, as well as the intended benefits for the taxpayers and the public overall by achieving superior project performance. CQC will continue to analyze and comment on EO 13673 implementation procedures to ensure that the implementation is fair to the superior and proven contractors and subcontractors competing to win work on Federal projects to bring those projects routinely to successful project completion.

CQC's perspective is multidimensional – accounting for prime contractor and subcontractor roles together - Many of CQC's member firms perform direct Federal construction projects across the country, either as prime contractors or subcontractors, at various times on different projects as one or the other, so CQC's perspectives on Federal procurement issues are multi-dimensional. What CQC recommends for prime contractors, impacts our role as subcontractors; and similarly, what we recommend for subcontractors, our members must implement when acting as prime contractors. No other group commenting on procurement and labor policy implementation brings that multidimensional perspective as fully.

The EO promotes high workforce standards for the benefit of the public project owner – the taxpoyers - CQC member firms perform jobsite construction work under collective bargaining agreements with building trades-represented employees. Our pay, benefits, and safety practices fully address and met

the goals of EO 13673. Our safety training and workforce development programs are recognized industry wide – private sector owners, such as the Construction Users Roundtable (CURT) (which includes Federal agency participation) even advocate contractor prequalification screening for adequate safety and workforce development records and programs.

CQC member firm workforce development policies, from joint training and apprenticeship programs, innovative military recruitment and on-base accelerated training programs, through to our top-flight pay, health, and pension benefit programs lead the industry. Our clients get the benefit of those high-value systems in first rate technical performance by the highly skilled professional technicians our joint labor/management apprenticeship/journeyman training systems turn out. In addition, CQC associations provide up-to-date, ongoing business administration, technology, supervisory and safety training to our member companies that also compound the performance premium that CQC member firms and their employees deliver to both public and private sector clients in the US and Canada.

The EO complements a number of other key government proprietary interests - CQC has long supported direct Federal procurement policies that raise the competitive bar in the market for Federal construction projects. CQC members firms benefit along with the Federal agencies and taxpayers when the market qualification and performance standards are high. Experienced project owners in both the public and private sectors increasingly rely on procurement policies that guard against the significant risk of contracting with marginal business partners – prime contractors and subcontractors - whose track records on legal compliance and problem-plagued jobs warrant careful screening and contracting safeguards.

CQC supports public project prevailing wage policies as a sound proprietary business judgment by public owners, and public agencies project labor agreement policies for the same reasons - the public owner's sound business judgments must be encouraged and respected. CQC has long been on record with full support of legislative and regulatory efforts to stanch the rampant abuse of misclassification of employees as independent contractors in the construction industry. Similarly, CQC was in the lead among only a few industry groups that supported a precursor of EO 13673, the Contractors and Federal Spending Accountability Act (Section 872 of the 2008 National Defense Authorization Act), which began the contractors legal compliance database that is now the Federal Awardee Performance and Integrity Information System (FAPIIS) that is key to the operation of the policies of EO 13673.

CQC was instrumental in rebutting the exaggerated claims of "blacklisting" back when the measure passed in 2008. CQC pointed out then, as it does in this statement, that EO 13673 preserves the Contracting Officer's discretion to make responsibility determinations in the exercise of the CO's best professional judgment of whether the prospective awardee is capable of performing the project as proposed. The Contracting Officer's contracting warrant empowers the CO to make that proprietary

judgment - nothing in EO 13673 changes that standard. If anything, the EO may be said to rein in that discretion somewhat by providing new review, remedies and redress for prime contractors and subcontractors whose legal compliance records initially warrant an ineligibility determination based on lack of integrity or business ethics. The EO procedures in this respect are more permissive for firms that would question an initial ineligibility determination. In that sense, the EO provides transparency and uniformity where it does not now fully exist in FAR Part 9 procedures. Taking in that light, the EO can be characterized as the antithesis of a blacklisting provision. Similarly, the specific list of legal compliance review items is no more expansive than current FAR procedures permit for business ethics and legal compliance integrity eligibility determinations. While it is true that the 6-month updated certification requirement is new – it too might be fairly characterized as sound proprietary contract administration vigilance.

In summary, CQC does not presume that Contracting Officers are predisposed to abuses of issuing unwarranted non-responsibility determinations. If anything, the record of past reports shows that haste in making awards has led to overlooking problematic performance records. The CO's mission is to successfully complete the project – the EO should be interpreted to be in entire accord with that aim. If anything, the EO should be characterized as adding Labor Compliance Advisor reviews to guard against unwarranted ineligibility determinations. Also, a fair assessment of the EO would grant that it is much in line with best practices in the private sector, where private sector project owners are careful to prequalify top performing firms on the basis of contract and legal compliance performance backgrounds. To the extent possible, EO 13673 would have direct Federal agencies exercise the same proprietary contract eligibility judgments that are routine in the private sector.

Finally, CQC, along with many other industry groups, has long condemned the practice of post-award subcontract bid shopping and bid peddling on public contract awards, and has long sought implementation of a simple and proven sub bid listing procedure on direct Federal contractor selection procedures to guard against the unethical practice of post-award bid shopping and peddling that all too frequently impairs successful project completion. So, in this sense, with the recommendations below on consolidating the subcontractor eligibility screening process at the time of prime contract award, the EO also promotes a sound and proven subcontractor subcontract bid listing procedure as a way to better implementation of the EO.

CQC comments on regulatory approaches to ensure full effectiveness of the EO policy - CQC's experienced construction project professionals, who have experience as both primes and subcontractors – have reviewed EO13673 and are in full support of its aims and purposes, and are eager to provide their expertise and analysis in helping to propose implementing procedures that achieve the intended purposes of the EO – to raise the competitive bar in the Federal marketplace for the benefit of the government and the taxpayers.

To fully achieve the primary purpose of the EO' main procedure, to carefully and effectively screen the legal compliance records of prospective prime contractors and subcontractors, some innovative approaches should be considered fully in line with existing Federal Acquisition Regulatory policy: in FAR Part 1, promoting Acquisition Team contracting with superior performance teams and conducting business with integrity, fairness and openness (FAR Part 1.102); in FAR Part 3's emphasis on contractor business ethics, and proscriptions against contractor's buying in to contracts; and FAR Part 9, reservation of contracting officer discretion to make independent subcontractor responsibility determinations.

CQC recommends a regulatory approach that would consolidate the legal compliance screening process for both prime contractors and subcontractors in Section 2 of the EO - The EO requires the prime contractor to make the legal compliance representation/certification to the Contracting Officer in the post-award responsibility determination process, and then to flow down that requirement so that prime contractors require the parallel representation/certification from covered subcontractors to the prime contractor before award of each subcontract under a covered prime contract. The EO says the Labor Compliance Advisor (LCA) shall be available, where appropriate, to assist the prime contractor in assessing subcontractor certifications. We suggest that this process may present some risks to successful project performance that can be avoided in regulations. The problem is that subcontractors who are awarded subcontracts in the middle or late stages of the project may not qualify, necessitating substitutions mid project or later, with the risk of project delays and perhaps claims for increased costs because of the late ineligibility determination. Unscrupulous prime contractors might misapply the eligibility criteria in order to change originally accepted subcontract prices or terms. Also, there is the question of uniformity of application of criteria if the primes are exercising judgments that are not in line with the agency LCA standards, and there are project ramifications because of that variation. The EO says only the LCA shall be available to the prime to help with its responsibility determination of the subcontractor – it's not required. Similarly, the discipline of reporting accuracy may be different when subcontractors are making representations to the prime contractor, as compared with when the prime contractor is making representations to the contracting officer. If False Claims Act discipline applies to the prime contract representations but not the subcontractor representations, then there also may be negative project consequences that could be avoided if regulations were to require all representations to be made to the agency. This would avoid any risk there might be of vicarious liability on the prime contractor for inaccurate subcontractor representations, or inconsistent application of legal compliance evaluation criteria. Moreover, this would provide equitable and equal protection for prime contractors and subcontractors, in those instances where courts and contract bid protest authorities allow businesses that are denied public contracts on the basis of a lack of integrity or business ethics some due process protections in challenging those adverse determinations.

Adopt proven public contracting regulatory approaches to stem persistent bidding abuses and fully and consistently implement the objectives of EO 13673 - The regulatory approach that would help avoid

these issues would be to require major subcontract bid listing on all manner of direct Federal prime contractor selections procedures – FAR Part 14 low-bid selections, FAR Part 15, negotiated trade-off, and low-price/technically-acceptable (LPTA) procedures, and multiple award task order (MATOC) and indefinite delivery/indefinite quantity (IDIQ) contracting vehicles. So, if the apparently successful offeror/bidder prime contractor had to list/name the major covered subcontractors in its successful bid/offer, then the Contracting Officer could evaluate both the prime and the covered subcontractors in the initial responsibility determination process. The LCA could be deployed at one time to ensure uniform application of eligibility criteria for all performing contractors on the project. The prime contractor would be assisted in unchallenged application of the criteria, and could avoid question of fairness and liability for mistakes later. The subcontractor certification would be made to the agency and not the prime contractor. The False Claims Act discipline would be the same for all performing contractors on the project. The regulations would have to make necessary accommodations for late performing subcontractors who incur disqualifying events in the time between the initial responsibility determination and the time of the award of the subcontract, but the earlier eligibility screening for all would help avoid otherwise detectable surprise disqualifications later in the project. Contract equitable adjustments would have to be made in the event the prime is not responsible for a late and warranted subcontractor ineligibility determination.

Expand CPARS system to include post project performance evaluations of major subcontractors for inclusion in the CPARS and FAPIIS systems - CQC recommends that the regulators consider opening up the project completion process now under the Contractor Performance Assessment Reporting System (CPARS) to include an evaluation of major subcontractor project performance as well. Subcontractors should be allowed the same remedies and contest procedures that are permitted to prime contractors now under CPARS ratings. We are aware that Contracting Officer cognizance of all elements of prime and subcontractor performance issues are not typically in their Contracting Officer's administration of the project – but perhaps they should be. The scope of that expanded oversight can be decided on an *ad hoc* basis – but should be an option in particular cases, if not routinely adopted across the board. On most substantial, large scope construction projects of the type that involve multiple subcontracts, major subcontractors are performing the vast majority of the work. CQC also is aware that often some remote technical contract issues like privity of contract relations between the prime contractor and the subcontractor are put up as barriers to proven new approaches – but new approaches are just what is required to ensure that substandard performers don't win work repeatedly, so that superior project performance becomes a more routine outcome. The FAR policies cited above certainly would warrant some innovative approaches that FAR Part 1 encourages.

Test pilot direct Federal separate prime contracts contracting options - Finally, CQC recommends that regulatory policy should consider even further innovative contracting policy approaches. CQC would recommend that the FAR Council consider separate prime contracting policy approaches for projects of appropriate scope as an alternative to major subcontract bid listing to see if that helps expand the

effective policy aims of EO13673. That is, as is the practice in several or more state procurement programs, Federal agencies should consider adopting an optional method of using separate prime contracts in building type projects where there are multiple major subcontractors, where general conditions contractors, and mechanical, electrical, and plumbing contractors bid directly to and contract directly with the Federal agency, with overall project contract administration assigned to one firm or contracted out to a construction manager/agent of the owner. In several states, this contracting method option has proven to save costs and improve project delivery. The OMB/FAR Council might be encouraged to test pilot some sufficient number (10 or so) direct Federal separate prime contract projects to see if that approach has any merit in achieving the goals of the EO. The agencies that implement the test pilot projects should report back in a short specific period of time and then the FAR Council could use that report to consider developing separate prime contracting project delivery methods as an optional contracting method for Federal agencies.

Other aspects of EO 13673 - In summary, as to the paycheck disclosures and legal complaint and disputes transparency provisions, as well as the employee misclassification aspects of the EO, CQC member firm collective bargaining agreement terms and conditions fully meet those standards for their jobsite craft workforce. As to CQC member firm employees exempt from the discipline of collective bargaining agreement coverage, CQC member firms fully support tightening up controls against worker misclassification and wage and hour abuses on direct Federal projects.

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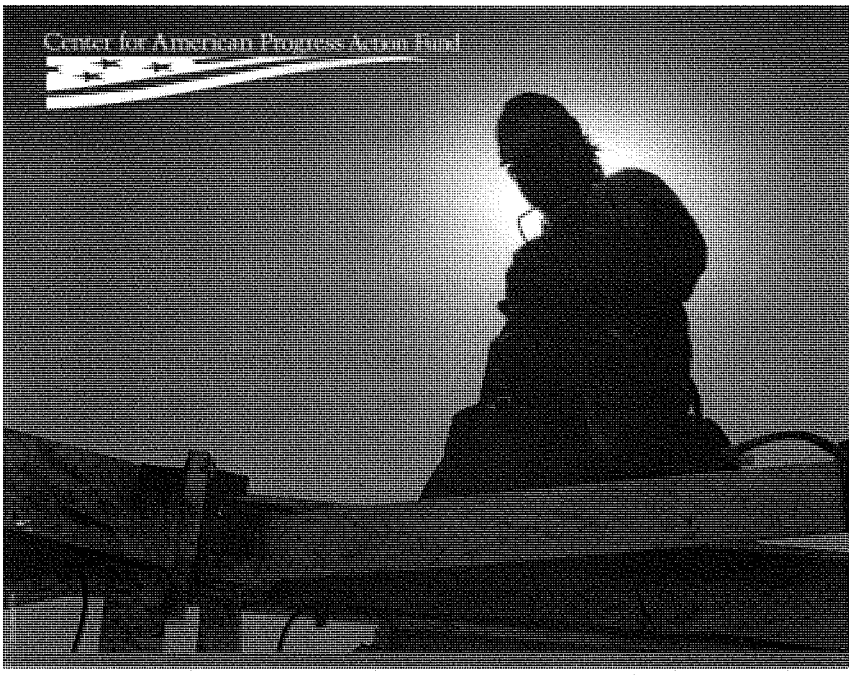

At Our Expense

Federal Contractors that Harm Workers Also Shortchange Taxpayers

By Karla Walter and David Madland December 2013

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Center for American Progress Action Fund

At Our Expense

Federal Contractors that Harm Workers Also Shortchange Taxpayers

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Introduction

The federal government spends hundreds of billions of dollars every year contracting out government services ranging from the design and manufacture of sophisticated weapons systems to janitorial and maintenance work. Yet the review process to ensure that only responsible companies receive federal contracts is very weak, and too often the government contracts with companies with long track records of violating workplace laws. New analysis from the Center for American Progress Action Fund, or CAP Action, shows that contracting with companies with egregious records of workplace violations also frequently results in poor performance of government contracts.

Our analysis builds on a 2010 report from the Government Accountability Office, or GAO, which scrutinized the companies levied with the 50 largest workplace health and safety penalties and those that received the 50 largest wage-theft assessments between fiscal year 2005 and fiscal year 2009. The GAO investigation found that even after committing such violations, these companies frequently received new government contracts.[1] CAP Action—reviewing the same universe of companies analyzed by the GAO[2]—found that the companies with the worst records of harming workers were also often guilty of shortchanging taxpayers through poor performance on government contracts and similar business agreements in ways that defraud the government or otherwise provide a bad value for taxpayers.[3]

Among the 28 companies that received the top workplace violations from FY 2005 to FY 2009 and subsequently received federal contracts, a total of seven companies—or 25 percent—also had significant performance problems.[4]

These performance problems ranged from contractors submitting fraudulent billing statements to the federal government; to cost overruns, performance problems, and schedule delays during the development of major weapons systems that cost taxpayers billions of dollars; to contractors falsifying firearms safety test results for federal courthouse security guards; to an oil rig explosion that spilled millions of barrels of oil into the Gulf of Mexico.

Although the federal government does not provide data on the frequency of performance problems across all federal contractors for comparison, the fact that one in four contractors with persistent or egregious workplace violations subsequently provided bad value for the government signals a serious cause for concern.

While this CAP Action analysis represents new evidence that companies who flout workplace laws also often show disregard for taxpayer value, our evaluation is not the first to find this link. Thirty years ago, the U.S. Department of Housing and Urban Development found a "direct correlation between labor law violations and poor quality construction" on HUD projects, and found that these quality defects contributed to excessive maintenance costs.[5]

Similarly, a 2003 Fiscal Policy Institute survey of New York City construction contractors found that contractors with workplace law violations were more than five times more likely to receive a low performance rating than contractors with no workplace law violations.[6] And a 2008 CAP Action report found a correlation between a contractor's failure to adhere to basic labor standards and wasteful practices.[7] Indeed, it is increasingly common for private-sector companies to factor in a bidder's workplace safety record in contracting decisions.[8]

The federal government could have prevented many of these performance problems by reviewing companies' records of workplace violations before awarding a government contract and excluding those companies with persistent or egregious violations. This sort of examination is supposed to occur—federal regulations require that contractors have a satisfactory record of performance, integrity, and business ethics,[9] in order to ensure that the government only does business with responsible companies with good performance records.[10]

The existing tools to ensure that this actually happens, however, are woefully inadequate. The federal database tracking contractor responsibility—the Federal Awardee Performance and Integrity Information System, or FAPIIS—is largely dependent on self-reported data even though official records such as workplace and environmental violations are already collected by enforcement agencies and made publicly available in government enforcement databases.[11]

The FAPIIS database includes only the legal violations committed by a company while working on federal contracts or grants, but not information on these contractors' private-sector compliance history.[12] What's more, most workplace violations are excluded due to high thresholds for reimbursement, restitution, and damages.[13] This means that federal contracting officers may miss more than half the story about a company's record of compliance.

Moreover, enforcement agencies provide no analyses of contractors' legal records, and contracting officers receive no guidance from existing regulations on how to evaluate bidders' responsibility records. A contracting officer would have to sift through millions of compliance records—evaluating everything from companies' tax and environmental violations to workplace safety and pay records—and use their own judgment about whether past violations are enough to find a contractor not responsible.[14] As a result, the new database has not formed the basis of rigorous responsibility review.

We profile the performance problems of the contractors revealed by our analysis in the following section.

CAP Action has previously detailed a number of policy reforms that would help address these issues,[15] but in order to maintain focus on the problems in the contracting system, we do not repeat our recommendations here.

Performance problem profiles

Among the 28 companies that were at the top in workplace violations from fiscal year 2005 to fiscal year 2009 and subsequently received federal contracts, we identified a total of seven companies—or 25 percent—that also had significant performance problems. We include only those performance problems that occurred after the workplace violation case was closed.

Currently, the federal government provides the public little information to evaluate the performance of companies on contracts or to determine how the government evaluates past performance. The federal government tracks performance through its Past Performance Information Retrieval System, but this information is not made available to the public.

We consequently relied on a search of publicly available websites—including federal enforcement sites, company U.S. Securities and Exchange Commission filings, the Project on Government Oversight's Federal Contractor Misconduct Database, and news searches—to obtain performance information. As a result, this report may undercount performance problems, since many instances may not have been made public or may not have received significant media attention.[16]

We also include in the profiles below data from government websites on the total value of the federal contracts between FY 2009 and FY 2013 for each contractor with past performance problems.[17] While government agencies and advocacy groups have found significant problems with government procurement spending data,[18] they are the best data available.

Each contractor profile starts with a brief description of the labor law violated and the penalty assessed. Next, we highlight the total value of contracts awarded between FY 2009 and FY 2013. Finally, we detail the various performance problems of the contractor, subsequent to the workplace violation and penalty.

Note: The source data for workplace violations was obtained from the Department of Labor's online database[19] and the Department of Labor's Wage and Hour Division.[20] The total value of contracts awarded between FY 2009 and FY 2013 comes from the Federal Procurement Data System.[21]

Contractor performance problems by company

KBR, defense construction and service contractor

- Assessed $1.1 million in back wages for violations of the Davis-Bacon Act (case closed in 2007).
- Awarded about $11.4 billion in government contracts from FY 2009 to FY 2013.

Performance problems

- Failed to meet a performance level deserving of government payment for combat-support work completed during the first four months of 2008, according to the U.S. Army Sustainment Command.[22] The command's statement did not reference the January 2008 death by electrocution of a soldier stationed in Iraq, but said that officials investigating the soldier's death and the electrical work performed by the company were consulted in reaching the decision.[23] The company estimated that it would have earned about $20 million for its work during this period.[24]
- Disqualified from participating in two competitions for combat-support services contracts in 2008 after a company employee accessed source-selection and proprietary information on competing bidders and the company refused to take corrective action.[25]
- Overcharged the government $1.4 million in lease charges and fees associated with a subcontractor's cooking-equipment purchase, according to a 2010 report from the Inspector General of the Department of Defense.[26]
- Company employee pled guilty to bribery for her participation in a fraudulent billing scheme to overcharge the U.S. Army for trucking services in Afghanistan between April 2008 and December 2008.[27]

BP, multinational oil and gas company

- Initially assessed $43 million in fines for four separate violations of the Occupational Health and Safety Act (cases closed in 2008 and 2009).[28]
- Awarded about $4.6 billion in government contracts and $433 million in federal offshore oil and gas leases from FY 2009 to FY 2013.[29]

Performance problem

- Responsible for an offshore oil well blowout on land leased from the federal government that killed 11 workers[30] and resulted in the largest oil spill in U.S. waters (4.9 million barrels) and billions of dollars in economic damage in 2010.[31] BP pled guilty to 11 felony counts of misconduct or neglect of ship officers for the worker deaths as well as a felony count of obstruction of Congress and misdemeanor counts under federal environmental laws. The contractor agreed to a criminal penalty settlement of $4 billion in 2012.[32] The Environmental Protection Agency announced on November 28, 2012, that it was temporarily suspending BP from receiving new federal government contracts, grants, or other covered transactions until it could demonstrate that "it meets Federal business standards."[33] In February 2013, the EPA separately disqualified BP Exploration & Production Inc. under the Clean Water Act from receiving any new federal contracts or other benefits.[34] The company has spent more than $14 billion in cleanup operations, according to a January 2013 report from the Congressional Research Service.[35]

Corrections Corporation of America, or CCA,
correctional facilities and immigrant detention center manager

- Assessed $1.5 million in back wages for violations of the Service Contract Act (case closed in 2005).
- Awarded about $2.3 billion in government contracts from FY 2009 to FY 2013.

Performance problem

- CCA violated contract requirements against detainees being transported without a same-sex officer present at a Texas immigrant detention center in 2010, according to analysis by the American Civil Liberties Union of government documents obtained through a Freedom of Information Act request.[36] The American Civil Liberties Union of Texas filed a lawsuit on behalf of the

women in 2011 naming the company, two former employees at the facility, and three ICE officials. The guard accused in the case pled guilty to two federal deprivation-of-rights charges as well as five misdemeanor charges in relation to his assaults of immigrant detainees.[37] The ACLU recently settled another suit, also filed in 2011, alleging that a transgender woman was sexually assaulted by a CCA guard at another immigrant detention center.[38] The suit named CCA; Immigration and Customs Enforcement, or ICE, officials; and the City of Eloy, Arizona, where the center is located. The claims settled in the agreement were allegations only, and there was no determination of liability.

Akal Security, Inc., security services company

- Assessed $1.15 million in back wages for violations of the Service Contract Act (case closed in 2005).
- Awarded about $3.6 billion in government contracts from FY 2009 to FY 2013.

Performance problem

- Agreed to pay almost $1.9 million in 2012 to settle allegations that the company falsified firearms safety test results for federal courthouse security guards from 2007 and 2011 in the Northern District of California.[39] The Department of Justice alleged that company employees administering the firearms qualifications test did not apply required time limits, sometimes out of concerns that security guards would not pass a timed test. The company took corrective steps to ensure compliance. The claims settled in the agreement between Department of Justice and Akal Security were allegations only, and there was no determination of liability.

Wackenhut Services, Inc., security services company[40]

- Assessed $2.5 million in back wages for violations of the Service Contract Act (case closed in 2008).
- Awarded about $1.7 billion in government contracts from FY 2009 to FY 2012.

Performance problem

- Company subsidiary, ArmorGroup of North America, failed to comply with several requirements of a State Department contract to provide security for the U.S. Embassy in Kabul, Afghanistan, "which could potentially undermine the security of the U.S. mission," according to a 2010 report by the State Department Office of Inspector General.[41] The company was unable to recruit and train security forces to the staffing levels and quality required by the contract, with violations that included: employing Nepalese guards without verifiable experience and training and insufficient language skills; qualifying guards who did not pass firing range tests; not adequately training canine explosive detection units; and allowing disciplinary problems among company personnel to go uncorrected.

Lockheed Martin, aerospace, defense, security, and advanced technology company

- Assessed $974,000 in back wages for violations of the Fair Labor Standards Act at Knolls Atomic Power Laboratory, where Lockheed Martin was the operating contractor (case closed in 2006).[42]
- Assessed $2 million in back wages for violations of the Fair Labor Standards Act at Sandia National Laboratories, operated by Sandia Corporation, a wholly owned subsidiary of Lockheed Martin (case closed in 2009).
- Awarded about $170.7 billion in government contracts from FY 2009 to FY 2013.

Performance problems

- Lockheed Martin is the lead aircraft contractor developing the F-35 Joint Strike Fighter, a new aircraft for the Air Force, Navy, and Marine Corps, which has been plagued by performance problems, cost overruns, and schedule delays. The Department of Defense withheld $614 million in performance fees in 2010 after an independent assessment team found that Lockheed Martin and its subcontractors had failed to meet key benchmarks in the development of the aircraft.[43]

- More recently, a 2013 Department of Defense Inspector General report found hundreds of flaws in the way Lockheed Martin and its subcontractors produced the F-35.[44] The report concluded that the company was not following contractually required quality management standards and recommended that the government modify its contracts to include a quality escape clause to ensure that the government doesn't pay for poor-quality products.

  The aircraft will not go into full production until 2019, seven years later than originally planned, according to a March 2013 report by the Government Accountability Office.[45] Total U.S. investment to develop and procure 2,457 jets through 2037 is now expected to reach $396 billion—70 percent higher than the total price tag of $233 billion projected in 2001 at the start of system development. Meanwhile, Department of Defense services are spending about $8 billion to extend the life of existing aircraft and buy new ones.[46]

- Terminated for cause on a contract with the Department of the Army to consolidate a medical research laboratory at Fort Detrick, Maryland, in 2013. The termination was based on "seriously defective deliverables," according to a memo from the contracting officer. [47]
- Failed to meet a performance level deserving of a payment in the first quarter of 2007 on a contract to provide preflight briefings to plane pilots on weather and other flight conditions. The Federal Aviation Administration withheld $3 million in payments.[48]

Group Health Cooperative, health maintenance organization

- Assessed $1.4 million in back wages for violations of the Fair Labor Standards Act (case closed in 2005).
- Awarded about $20.2 million in government contracts from FY 2009 to FY 2012 and collected $621.3 million in premiums from the Federal Employees Health Benefits Program between FY 2006 and FY 2008.[49]

Performance problem

- Overcharged the government $33 million in inappropriate health benefits charges under the Federal Employee Health Benefits Program in 2007 and 2008, according to an audit by the Inspector General of the Office of Personnel Management.[50]

Conclusion

Federal regulations require that the government only do business with responsible contractors that have a satisfactory record of performance, integrity, and business ethics. Yet weak guidance and lax enforcement of these regulations means that the government frequently contracts with companies with long track records of violating workplace regulations and laws.

New analysis from the Center for American Progress Action Fund shows that this not only hurts workers, but all too often provides a bad deal for taxpayers who must pay for poorly performed contracts and live with the consequences of shoddy work that damages the environment, undermines public safety, and jeopardizes national security. Government can go a long way toward protecting workers and taxpayers alike by reviewing records of workplace law violations by companies before awarding them lucrative government contracts.

Appendix: Methodology

This report builds on the analysis of a 2010 report from the Government Accountability Office, "Federal Contracting: Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors," which surveyed the companies receiving the 50 largest workplace health and safety penalties and the 50 largest wage-theft assessments between fiscal year 2005 and fiscal year 2009 to determine if these companies continued to receive government contracts.[51]

CAP Action reviewed the same universe of companies analyzed by the GAO. The GAO does not make the data it used for its analysis publicly available because it includes company-specific information. We were, however, able to obtain data on workplace health and safety violations from the Department of Labor's online database,[52] and data on wage-theft assessments from the Department of Labor's Wage and Hour Division.[53] We also spoke with authors of the GAO report in order to verify that we followed the same methodology used in their analysis.

The 50 largest workplace health and safety penalties are defined as the 50 largest penalties for violations of the Occupational Safety and Health Act closed by the Occupational Safety and Health Administration between FY 2005 and FY 2009.

The 50 largest wage-theft assessments are defined as the 50 largest back-wage assessments for violations of the Service Contract Act, Fair Labor Standards Act, Family and Medical Leave Act, and Davis-Bacon Act closed by the Department of Labor's Wage and Hour Division between FY 2005 and FY 2009. The GAO excluded Davis-Bacon Act violations from its review because the agency makes determinations on whether to suspend or debar companies with such violations. CAP Action's final list of the top 50 wage-theft violators included two companies with violations of the Davis-Bacon Act.

We used the government websites USAspending.gov and the Federal Procurement Data System (www.fpds.gov) to determine whether a company continued to receive federal contracts after receiving a major workplace violation. Companies must have received a federal contract valued at more than $100,000 in FY 2009 in order to be counted as a federal contractor. Companies that received government contracts after FY 2009, but not in FY 2009, were excluded from our count—again to keep our methodology consistent with that of the GAO.

We also include in the profiles above data from the Federal Procurement Data System on the total value of the federal contracts between FY 2009 and FY 2013 for each contractor with past performance problems. While government agencies and advocacy groups have found significant problems with government procurement spending data in the past,[54] they are the best data available.

We found the same number of companies with top safety violations that continued to receive government contracts (eight companies total), and top wage-theft assessments to receive government contracts (20 companies total) as the GAO. However, our final list of bad actors—companies with long track records of fraud and violations of labor law and workplace safety regulations—does not match the GAO's list exactly since we included violations of the Davis-Bacon Act.

We obtained performance information through a search of publicly available websites, including federal enforcement sites, company U.S. Securities and Exchange Commission filings, the Project on Government Oversight's Federal Contractor Misconduct Database, and news searches. We may undercount performance problems, since some instances may not have been made public or received significant media attention. While the federal government tracks contractor-performance data through its Past Performance Information Retrieval System, this information is not made available to the public.

We also include in our analysis performance problems by the companies in government programs that are not managed through the federal contracting system, but are substantially similar sorts of business agreements where the government entered into contracts or agreements that provided payment to companies in exchange for goods or services. We include, for example, energy companies receiving offshore oil and gas leases from the Department of the Interior's Bureau of Ocean Energy Management and companies participating as insurance carriers in the Federal Employee Health Benefits Program.

Further, we do not limit our findings of performance problems to a firm making an admission of fault. We include all government findings of performance problems, lawsuits alleging performance violations where companies have settled, and cases where an employee was found guilty of misconduct while carrying out contract duties.

We include only those performance problems that occurred after the workplace violation case was closed or, in the instances where a company had multiple workplace violations, performance problems occurring after the first case was closed.

About the authors

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Endnotes

1 Government Accountability Office, "Federal Contracting: Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors," GAO-10-1033, Report to Congressional Requesters, September 2010. The 50 largest wage-theft assessments are defined as the 50 largest back-wage assessments closed by the Wage and Hour Division of the Department of Labor between FY 2005 and FY 2009. The 50 largest workplace health and safety penalties are defined as the 50 largest penalties for violations of occupational safety and health regulations closed by the Occupational Safety and Health Administration of the Department of Labor between FY 2005 and FY 2009. The GAO found that one-third of companies with these significant violations went on to receive a government contract in FY 2009.

2 More on our research methods is available in the "Methodology" appendix.

3 We also include in our analysis performance problems by the companies in government programs that are not managed through the federal contracting system, but are substantially similar sorts of business agreements where the government entered into contracts or agreements that provided payment to companies in exchange for goods or services. This includes, for example, energy companies receiving offshore oil and gas leases from the Department of the Interior's Bureau of Ocean Energy Management and companies participating as carriers in the Federal Employee Health Benefits Program. These programs are not managed through the federal contracting process, but do require participants to have satisfactory compliance with the law.

4 The federal government does not make contractor performance information publicly available. In order to determine whether a contract had performance problems, we reviewed publicly available news and data sources. We do not limit our findings of performance problems to a firm making an admission of fault. We include all government findings of performance problems, lawsuits accusing performance violations where companies have settled, pending cases where the government has accused a company of performance problems, and cases where an employee was found guilty of misconduct while carrying out contract duties. Out of the 20 companies that received at least one of the 50 largest wage-theft assessments and continued to receive government contracts, six companies were found to have a performance problem. Among the eight companies that received at least one of the 50 largest workplace health and safety assessments and continued to receive government contracts, one company was found to have a performance problem.

5 Office of Inspector General, *Audit Report on Monitoring and Enforcing Labor Standards* (U.S. Department of Housing and Urban Development, 1983).

6 Moshe Adler, "Prequalification of Contractors: The Importance of Responsible Contracting on Public Works Projects" (New York: Fiscal Policy Institute, 2003).

7 David Madland and Michael Paarlberg, "Making Contracting Work for the United States: Government Spending Must Lead to Good Jobs" (Washington: Center for American Progress, 2008).

8 Transportation Research Board of the National Academies, "Best Value Procurement Methods for Highway Construction Projects" (2006). Also, a number of industry associations, including the Construction Users Roundtable, the American National Standards Institute, and FM Global, recommend evaluating the safety record of companies bidding for contracts. See Construction Users Roundtable, "Construction Owners' Safety Blueprint R-807" (2004); Scott Schneider, "New ANSI Standard Tells Employers To Plan for Safety" (Washington: Laborers' Health & Safety Fund of North America, 2012), available at http://www.lhsfna.org/index.cfm/lobjectID=422F9EDF-D56F-E6FA-9F1C44F96947525; FM Global, "Holding to a Hire Standard," *Reason* (1) (2012), available at http://www.fmglobalreason.com/article/holding-hire-standard.

9 Federal Acquisition Regulation, Subpart 9.1—Responsible Prospective Contractors.

10 Similarly, the Department of the Interior's Bureau of Ocean Energy Management requires that leases be awarded only to qualified bidders that have an acceptable "operating performance." The Federal Employee Health Benefits Program requires companies applying to participate as a carrier to provide evidence that they "are not debarred, suspended, or ineligible to participate in Government contracting for any reason," and that they have not violated a variety of other laws. See 30 C.F.R. Part 550, "Oil and Gas and Sulphur Operations in the Outer Continental Shelf"; David Madland and Karla Walter, "Rein in Irresponsible Oil Drillers: Government Shouldn't Have Been Doing Business with BP in the First Place," Center for American Progress Action Fund, June 3, 2010, available at http://www.americanprogressaction.org/issues/regulation/news/2010/06/03/7958/rein-in-irresponsible-oil-drillers/; Office of Management and Budget, "Application to Participate as a Carrier under 5 U.S.C. 8903(4)," available at http://www.opm.gov/healthcare-insurance/healthcare/carriers/#url=Carrier-Application; 5 U.S.C. § 8902a.

11 Contractors with current active federal awards with total value greater than $10,000,000 are required to self-report legal violations. The database also includes determinations entered by federal government personnel including: terminations for default, terminations for cause, terminations for material failure to comply, nonresponsibility determinations, recipient not qualified determinations, defective pricing determinations, administrative agreements, and Department of Defense determinations of contractor fault.

12 David Madland, "Comments on the Proposed Regulations to Require the General Services Administration to Establish and Maintain a Contractor Responsibility Database," November 4, 2009, available at http://www.americanprogressaction.org/wp-content/uploads/issues/2009/11/pdf/ndaa_letter.pdf

13 Contractors with current active federal awards with total value greater than $10,000,000 must report any administrative proceeding in which there was a finding of fault and liability that results in the payment of a monetary fine or penalty of $5,000 or more; or the payment of a reimbursement, restitution, or damages in excess of $100,000. However, penalties and reimbursements for workplace violations often fall below these thresholds and frequently do not include an admission of fault.

14 Madland, "Comments on the Proposed Regulations to Require the General Services Administration to Establish and Maintain a Contractor Responsibility Database"; Karla Walter and David Madland, "Taking the High Road: Next Steps for Cleaning Up Federal Contracting," Center for American Progress Action Fund, August 11, 2010, available at http://www.americanprogressaction.org/issues/labor/news/2010/08/11/8275/taking-the-high-road/.

15 Ibid.; David Madland and Karla Walter, "High-Road Government: A Contracting Policy that Helps Workers, Taxpayers and Businesses," (Washington: Center for American Progress Action Fund, 2010); David Madland and Karla Walter, "Uncle Sam's Purchasing Power: How to Leverage Government Spending to Create Good Jobs," *Berkeley Journal of Employment and Labor Law* 31 (2) 2010: 425-445.

16 More on our research methods is available in the "Methodology" appendix.

17 We used the government websites USAspending.gov and the Federal Procurement Data System (https://www.fpds.gov/fpdsng_cms/).

18 See, for example, Government Accountability Office, "Government Transparency: Efforts to Improve Information on Federal Spending," Testimony Before the Committee on Homeland Security and Government Affairs, July 18, 2012, available at http://www.gao.gov/assets/600/592592.pdf.

19 U.S. Department of Labor, "Data Enforcement," available at http://ogesdw.dol.gov/index.

20 Data on file with authors.

21 Federal Procurement Data System, available at https://www.fpds.gov/fpdsng_cms/, last accessed November 2013.

22 Kimberly Hefling, "Contractor Linked to Iraq Death Loses $25M in Fees," Associated Press, February 25, 2010.

23 Ibid. The Army did not press charges against the company for the soldier's death.

24 Federal Contractor Misconduct Database, "Withholding 2008 LOGCAP Award Fees" (2010), available at http://www.contractormisconduct.org/index.cfm/1,73,222,html?CaseID=1282; "KBR Inc.," Securities and Exchange Commission Form 8-K, February 23, 2010, available at http://www.contractormisconduct.org/ass/contractors/29/cases/1282/1820/halliburton-withholding-2009-logcap-fees_8k.pdf.

25 Government Accountability Office, "Decision, Matter of: Kellogg Brown & Root Services, Inc.," B-400787.2; B-400861, February 23, 2009, available at http://www.contractormisconduct.org/ass/contractors/29/cases/1761/2631/halliburton-logcap-disqualif_gao.pdf.

26 Office of Inspector General, *Contingency Contracting: A Framework for Reform*, Report No. D-2010-059 (U.S. Department of Defense, 2010).

27 Department of Justice, "Former Employee of Army Contractor Pleads Guilty to Bribery to Facilitating Theft by Trucking Contractor in Afghanistan," Press release, October 24, 2012, available at http://www.contractormisconduct.org/ass/contractors/29/cases/1798/2739/halliburton-montes_dojpr.pdf.

28 Initial penalties on BP totaled $43 million in fines for four separate violations of the Occupational Health and Safety Act (cases closed in 2008 and 2009). These were later reduced to a total of $26 million in current penalties.

29 Bureau of Ocean Energy Management, "Lease Sale Information," available at http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Regional-Leasing/Gulf-of-Mexico-Region/GOMR-Historical-Lease-Sale-Information.aspx (accessed October 2013).

30 Other companies share responsibility for the oil well explosion.

31 Jonathan L. Ramseur and Curry L. Hagerty, "Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments" (Washington: Congressional Research Service, 2013), available at http://www.fas.org/sgp/crs/misc/R42942.pdf.

32 *United States of America v. BP Exploration and Production, Inc.*, United States District Court for the Eastern District of Louisiana, available at http://www.justice.gov/iso/opa/resources/433201211151436139900027.pdf.

33 Environmental Protection Agency, "BP Temporarily Suspended from New Contracts with the Federal Government," Press release, November 28, 2012, available at http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/2eaf1c1dc80c969885257abf006dafb0!OpenDocument.

34 BP has sued the EPA challenging the government's suspension of the company from new contracts and leases. *BP Exploration & Production Company, Inc. et.al. v. Gina McCarthy et.al.*, available at http://thehill.com/images/stories/news/2013/08_august/13/bp-epa-lawsuit.pdf.

35 Jonathan L. Ramseur and Curry L. Hagerty, "Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments" (Washington: Congressional Research Service, 2013), available at http://www.fas.org/sgp/crs/misc/R42942.pdf.

36 The T. Don Hutto Residential Center is owned and operated by the Corrections Corporation of America. However, the facility is contracted through an intergovernmental service agreement between ICE and Williamson County, the Texas county in which Hutto is located. The contract with the county required that during all transportation activities, "at least one transportation officer shall be of the same sex as the residents being transported" and that "the subcontractor will be held to the same terms and conditions as the Service Provider." Also, CCA's Quality Control Plan (included as an attachment to the contract) states that the plan is fully consistent with the ICE Statement of Work which includes the same transportation requirements. "Intergovernmental Service Agreement between the United States Department of Homeland Security U.S. Immigration and Customs Enforcement and Williamson County, Texas," signed January 27, 2010, available at https://www.aclu.org/files/assets/Attachment_A.PDF; American Civil Liberties Union, "Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees Is Widespread National Problem," Press release, October 19, 2011, available at http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse; *Sarah Doe; Kimberly Doe; and Raquel Doe v. Jerald Neveleff, Immigrations and Customs Enforcement Contracting Officer, et. al.*, filed September 19, 2011, available at http://www.contractormisconduct.org/ass/contractors/170/cases/1713/2533/corrections-corp-of-america-_complaint.pdf.

37 Tricia Rosetty, "Former T. Don Hutto Worker Sentenced," *Taylor Daily Press*, November 10, 2010; Erin Green, "Dunn Pleads Guilty to Federal Charges," *The Hutto News*, September 22, 2011.

38 The detention center is owned and operated by the Corrections Corporation of America. However, the facility is contracted through an intergovernmental service agreement between ICE and the City of Eloy, Arizona. American Civil Liberties Union, "ACLU of Arizona Files Lawsuit on Behalf of Transgender Woman Sexually Assaulted By CCA Guard," Press release, December 5, 2011, available at https://www.aclu.org/immigrants-rights-lgbt-rights-prisoners-rights/acka-arizona-files-lawsuit-behalf-transgender-woman; *Guzman-Martinez v. Corrections Corporation of America, a Maryland corporation, et al, Notice of Settlement*, filed February 14, 2013 (notice on file with author).

39 Department of Justice, "Court Security Contractor to Pay $1.8 Million to Resolve Allegations That Guards Did Not Undergo Authorized Firearm Qualification Testing," Press release, September 27, 2012, available at http://www.justice.gov/opa/pr/2012/September/12-civ-1168.html.

40 In 2010, the Wackenhut Corporation officially changed its name to G4S Secure Solutions (USA) Inc.

41 U.S. Department of State and the Broadcasting Board of Governors, *The Bureau of Diplomatic Security Kabul Embassy Security Force: Performance Evaluation*, Report Number MERO-A-10-11 (Middle East Regional Office, September 2010), available at http://www.contractormisconduct.org/ass/contractors/88/cases/1460/2088/g4s-wackenhut-agna_dosreport.pdf.

42 Note that Knolls Atomic Power Laboratory was operated by Lockheed Martin until 2008.

43 Viola Gienger and Gopal Ratnam, "Lockheed's $614 Million of F-35 Fees Are Withheld (Update2)," Bloomberg, February 1, 2010.

44 Inspector General, *Quality Assurance Assessment of the F-35 Lightning II Program* (U.S. Department of Defense, 2013), available at http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z-pdf-archive/20131001_F35_IG.pdf; Lee Ferran, "Report: Military Lost Control of F-35 Contractors, Errors Abound," ABC News, September 30, 2013, available at http://abcnews.go.com/Blotter/report-military-lost-control-f35-contractors-errors-abound/story?id=20422344.

45 Government Accountability Office, "Joint Strike Fighter: Current Outlook Is Improved, but Long-Term Affordability Is a Major Concern," GAO-13-309, Report to Congressional Committees, March 2013, available http://www.gao.gov/assets/660/652948.pdf.

46 Ibid.

47 Department of the Army, "Memorandum for Record: Termination for Cause, contract W912DY-10-D-0042 task order 0003," May 3, 2013. Memo available on the Federal Awardee Performance and Integrity Information System, available at http://www.fapiis.gov (last accessed October 2013).

48 Federal Contractor Misconduct Database, "Lockheed Martin, Flight Service Station Problems," available at http://www.contractormisconduct.org/index.cfm/1,73,222,html?CaseID=646.

49 Inspector General of the Office of Personnel Management, "Semi-Annual Report to Congress" (2010), available at http://www.opm.gov/news/reports-publications/semi-annual-reports/sar43.pdf. Annual data on carrier premiums not available from www.usaspending.gov; however, a 2010 audit from the Inspector General of the Office of Personnel Management showed that the company received $621.3 million in premiums from the Federal Employees Health Benefits Program between FY 2006 and FY 2008.

50 Ibid.

51 Government Accountability Office, "Federal Contracting."

52 U.S. Department of Labor, "Data Enforcement," available at http://ogesdw.dol.gov/index.

53 Data on file with authors.

54 See, for example, Government Accountability Office, "Government Transparency."

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United States Government Accountability Office

GAO

Report to Congressional Requesters

September 2010

FEDERAL CONTRACTING

Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors

GAO-10-1033

GAO

Highlights

Highlights of GAO-10-1053, a report to congressional requesters

Why GAO Did This Study

In fiscal year 2009, the federal government obligated over $500 billion on government contracts. Some in Congress are concerned that private companies may be awarded federal contracts even though they had been cited for violating federal laws that are meant to ensure that employees receive proper wages, have the right to bargain collectively, and are not subject to workplace hazards.

GAO was asked to (1) investigate the extent to which companies that received federal contracts during fiscal year 2009 had been assessed the 50 largest monetary penalties for closed inspections of occupational safety, health, and wage regulations for fiscal years 2005 through 2009, and (2) develop case studies of federal contractors that have been assessed occupational safety, health, wage, and collective bargaining penalties. To perform this work, GAO obtained and analyzed enforcement wage and health and safety inspections from the Department of Labor's Wage and Hour Division (WHD) and Occupational Safety and Health Administration (OSHA) for fiscal years 2005 to 2009. GAO also obtained labor union organization and bargaining decisions from the National Labor Relations Board (NLRB). To determine the value of contracts awarded to GAO's case-study companies, GAO analyzed Federal Procurement Data System–Next Generation (FPDS-NG) data for fiscal year 2009.

View GAO-10-1053 or key components. For more information, contact Greg Kutz at (202) 512-6722 or kutzg@gao.gov.

September 2010

FEDERAL CONTRACTING

Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors

What GAO Found

The federal government awarded contracts to companies that previously had been cited for violating wage regulations enforced by WHD and health and safety regulations enforced by OSHA. GAO did not evaluate whether federal agencies considered or should have considered these violations in the awarding of federal contracts, thus no conclusions on that topic can be drawn from this analysis. Of the 50 largest WHD wage assessments during fiscal years 2005 through 2009, 25 wage assessments were made against 20 companies that received federal contracts in fiscal year 2009. From GAO's analysis of OSHA data, GAO also found that 8 of the 50 largest workplace health and safety penalties assessed during the same time frame of fiscal years 2005 through 2009 were assessed against 7 other companies that received federal contracts in fiscal year 2009. Because OSHA and WHD databases do not contain Data Universal Numbering System numbers, GAO's analysis was limited to the 50 largest WHD assessments and OSHA penalties, which GAO manually searched. Because of this, the full extent of the federal government's contracts awarded to companies cited for labor violations is not known.

GAO investigated 15 federal contractors cited for violating federal labor laws enforced by WHD, OSHA, and NLRB. The federal government awarded these 15 federal contractors over $6 billion in government contract obligations during fiscal year 2009. Several of these companies also had other types of violations, such as hiring undocumented workers, violating environmental standards, and fraudulently billing Medicare and Medicaid.

Examples of Federal Contractors That Were Cited for Violating Federal Labor Laws

Type of service provided	Contracting agencies / fiscal year 2009 contract amounts	Description of citations
Food supplier	Departments of Defense, Agriculture, and Justice ($500 million)	OSHA cited company for over 100 health and safety violations. For example, OSHA fined company after an employee was fatally asphyxiated after falling into a pit containing poultry debris. In 2009, federal court also ordered the company to properly compensate about 3,000 workers.
Security services	Departments of Defense and Homeland Security, and others ($200 million)	NLRB found that the company violated fair labor laws when it coerced employees and, in a separate incident, refused to rehire an applicant based on prior union involvement. WHD assessed $4.4 million in back wages for over 2,100 employees since fiscal year 2005. Company recently agreed to pay about $290,000 in back wages to over 400 African-Americans for a discrimination suit.
Electrical motors	Departments of Defense and Homeland Security ($200,000)	In 2007, an employee was killed by machinery that was lacking proper safety devices. OSHA investigators observed machinery without safety devices 1 month after the fatality. OSHA had previously cited the company for not ensuring that machinery had proper safety devices in 1998.

Sources: OSHA, WHD, and FPDS-NG.

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Abbreviations

Agriculture	Department of Agriculture
CBA	Collective Bargaining Agreement
CIGIE	Council of Inspectors General on Integrity and Efficiency
DBA	Davis-Bacon Act
DHS	Department of Homeland Security
DOD	Department of Defense
DOJ	Department of Justice
DOL	Department of Labor
DUNS	Data Universal Numbering System
Energy	Department of Energy
EPLS	excluded parties list system
FAR	Federal Acquisition Regulation
FLSA	Fair Labor Standards Act
FPDS-NG	Federal Procurement Data System–Next Generation
GSA	General Services Administration
HHS	Department of Health and Human Services
Interior	Department of the Interior
Labor	Department of Labor
NASA	National Aeronautics and Space Administration
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
OIG	Office of Inspector General
OSHA	Occupational Safety and Health Administration
SCA	Service Contract Act
SSA	Social Security Administration
Transportation	Department of Transportation
Treasury	Department of the Treasury
ULP	Unfair Labor Practice
VA	Department of Veterans Affairs
WHD	Wage and Hour Division

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United States Government Accountability Office
Washington, DC 20548

September 17, 2010

The Honorable Robert E. Andrews
Chairman
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and Labor
House of Representatives

The Honorable Patrick J. Murphy
House of Representatives

In fiscal year 2009, the federal government obligated over $500 billion on government contracts. Some in Congress are concerned that private companies may be awarded federal contracts even though they have violated federal laws that are meant to ensure that employees receive proper wages, have the right to bargain collectively, and are not subject to work-site hazards that could result in physical injury or death.

On the basis of your concerns regarding the federal government awarding contracts to companies with past large labor penalties and assessments, as requested we (1) investigated the extent to which companies that received federal contracts during fiscal year 2009 had been assessed the 50 largest monetary penalties for closed inspections of occupational safety, health, and wage regulations for fiscal years 2005 through 2009, and (2) developed case studies of federal contractors that have been assessed occupational safety, health, wage, and collective-bargaining penalties. As part of your request, we also determined whether these case-study firms provide health insurance to their employees.

To determine the number of large penalties involving citations for violating occupational safety and health regulations that had been assessed in fiscal years 2005 through 2009 against federal contractors that received contracts during fiscal year 2009, we obtained from the Department of Labor (Labor) a listing of all occupational safety and health penalties that had been assessed and closed by the Occupational Safety and Health Administration (OSHA) for fiscal years 2005 through 2009. We also obtained from Labor a listing of all wage assessments made by

Labor's Wage and Hour Division (WHD) for this same period.[1] For each of these listings, we identified the 50 largest monetary penalty assessments made by OSHA and the 50 highest monetary back-wage assessments made by WHD. The National Labor Relations Board (NLRB) does not issue fines or assessments against companies that violate collective bargaining laws. As such, we could not perform this analysis on the largest violations of collective bargaining laws. To determine whether those companies with violations received federal contracts during fiscal year 2009, we searched the contract data using the company's name from the Federal Procurement Data System–Next Generation (FPDS-NG) to determine whether those companies received federal contracts. However, the name-matching process was sometimes imprecise because contractor names can vary widely due to such factors as name combinations and parent/subsidiary relationships. Nevertheless, this was generally the only viable method available for identifying contractors involved in these cases because Data Universal Numbering System (DUNS)[2] numbers were not available. Therefore, due to name variations, we likely did not identify all of the contractors involved in the cases in the databases maintained by WHD and OSHA. To ensure that the federal contracts were significant, we excluded companies that received obligations of $100,000 or less during fiscal year 2009.

For our case studies, we identified 15 cases that represent the types of labor-law violation citations that occur in various industries. To develop case studies, we analyzed fiscal year 2005 through fiscal year 2009 wage, health, and safety data from Labor and also obtained labor union organization and bargaining violations data from NLRB. We restricted our analysis to those cases that have been settled or adjudicated and where the company had received over $100,000 in federal contract obligations during fiscal year 2009. In addition, we restricted our analysis to those WHD assessments of at least $100,000 and OSHA fines of at least $25,000. For our nine cases that have OSHA settlement agreements, because there was no adjudication and because these agreements generally contain language whereby the company denies violating labor standards, there is

[1]From Labor's WHD database we looked at violations of the Service Contract Act, Fair Labor Standards Act, and Family and Medical Leave Act. Because GAO makes determinations on whether to suspend or debar companies for Davis Bacon Act violations, we did not include those types of violations in our review.

[2]A DUNS number is a unique nine-character number adopted by the Office of Management and Budget to identify and keep track of federal funds dispersed to organizations.

no adjudicated violation. For each case study, we reviewed inspections, settlement agreements, and other relevant documents that are related to the cited violations. We also searched public records and other sources to determine whether there have been any other citations for potential criminal or civil activities. We also interviewed management officials from those companies to determine the extent to which employees receive health insurance. We did not make inquiries with contracting officers to determine the extent to which labor law violation citations were considered or should have been considered in the award of federal contracts because it was beyond the scope of this investigation.

Our analysis and investigations did not include companies with labor citations that had not been closed by OSHA, WHD, or NLRB through fiscal year 2009. For example, OSHA had proposed fines of over $55 million for a large petroleum company for cases opened between fiscal years 2005 and 2009. A large portion of the fines were assessed as a result of OSHA's safety and health inspections in 2005 after a massive refinery explosion where there were 15 deaths and almost 200 injuries. The firm's parent company received over $2 billion in federal contract obligations during fiscal year 2009. In addition, OSHA had also proposed fines of about $8.7 million as a result of inspections at a sugar refining company that were opened in fiscal year 2008. Five million dollars of these fines are related to a refinery factory explosion where there were 14 deaths and injuries to dozens of other workers. The federal government obligated about $6.5 million on federal contracts with this firm during fiscal year 2009.

We analyzed OSHA and WHD databases and determined they were sufficiently reliable for purposes of our audit and investigative work. To determine the reliability of the databases, we analyzed selected case-file information to ensure that specific data elements matched those found in the databases. We also performed electronic testing to determine the reasonableness of specific data elements in the databases that we used to perform our work. We also determined that the FPDS-NG was sufficiently

reliable for this review by confirming the companies had federal contracts with selected company officials and other sources.[3]

We conducted the work for this investigation from April 2010 through September 2010 in accordance with the standards prescribed by the Council of Inspectors General on Integrity and Efficiency (CIGIE).

Background

The Department of Labor and the National Labor Relations Board (NLRB) are responsible for enforcing many of the country's most comprehensive federal labor laws ranging from occupational health and safety to minimum wage, overtime pay, and the rights of employees to bargain collectively with their employers.

Most private sector firms—regardless of whether they are federal contractors—must comply with safety and health standards issued under the Occupational Safety and Health Act.[4] The act was meant "to assure safe and healthful working conditions for working men and women." The Secretary of Labor established OSHA in 1970 to carry out a number of responsibilities under the act, including developing and enforcing safety and health standards, educating workers and employers about workplace hazards, and establishing responsibilities and rights for both employers and employees for the achievement of better safety and health conditions.[5]

[3]Our previous work, as well as the work of the federal Acquisition Advisory Panel, has identified limitations in the accuracy and timeliness of data in FPDS-NG. Both GAO and the Acquisition Advisory Panel have reported that while FPDS-NG has been the primary governmentwide contracting database for capturing and reporting on various acquisition topics, such as agency contracting actions and procurement trends, it has had data quality issues over a number of years. While FPDS-NG data are useful for providing insight, the data are not always accurate at the detailed level. However, no other viable alternative currently exists for obtaining governmentwide data on federal procurements. See GAO, *Federal Contracting: Observations on the Government's Contracting Data Systems*, GAO-09-1032T (Washington, D.C.: Sept. 29, 2009) and *Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations*, GAO-08-160 (Washington, D.C.: Dec. 20, 2007).

[4]The act (26 U.S.C. 651 et seq.) covers most private-sector employers and employees. Major exemptions include employees of state governments and their political subdivisions, and workers engaged in industries, such as the nuclear power industry, that are regulated by other federal agencies under other federal statutes.

[5]The act also authorized states to operate, with up to 50 percent federal funding, their own safety and health programs. OSHA, however, is responsible for approving state programs and monitoring their performance to make sure they remain at least as effective as the program operated by OSHA.

OSHA is authorized to conduct workplace inspections to determine whether employers are complying with safety and health standards, and to issue citations and assess penalties when an employer is not in compliance. OSHA characterizes violations as serious, willful, repeat, and other-than-serious, with civil penalties in specified amounts for these various types of violations. Table 1 describes the different violations and their associated penalties.

Table 1: Types of OSHA Violations

Type of violation	Definition	Penalty amount
Serious	Substantial probability that death or serious physical harm could result, and the employer knew or should have known of the hazard.	Up to $7,000
Willful	Employer knowingly commits a violation or commits a violation with plain indifference to the law.	$5,000 to $70,000. If an employee dies and the employer is convicted in a criminal proceeding, the court may fine up to $250,000 for an individual or $500,000 for a corporation, or sentence imprisonment up to 6 months, or both.
Repeat	Violation found in current inspection is substantially similar to one found in a prior inspection. The inspection was conducted within 3 years of the final order or abatement date of the previous citation, whichever is later.	$5,000 to $70,000
Other-than-serious	Direct and immediate relationship to worker safety and health, even though hazardous condition cannot reasonably be predicted to cause death or physical harm.	May be assessed up to $7,000
Unclassified	Typically a violation that was initially classified as willful or repeat. In exchange for significant concessions, a company may accept unclassified violations, perhaps to avoid losing coverage under state workers' compensation programs or to minimize adverse publicity attached to the violations as originally classified.	Pays all or almost all of proposed penalty for initial violation classification.

Source: OSHA.

WHD works to enhance the welfare and protect the rights of the nation's workers through enforcement of the federal minimum wage, overtime pay, record keeping, and child labor requirements of the Fair Labor Standards Act; the Family and Medical Leave Act; and employment standards and worker protections provided in certain other laws. Additionally, WHD administers and enforces the prevailing wage requirements of the Davis-Bacon Act (DBA),[6] the Service Contract Act (SCA),[7] and other statutes

[6]40 U.S.C. §§ 3141-3144, 3146 and 3147.

[7]41 U.S.C. § 351 et seq.

applicable to federal contracts for construction and for the provision of goods and services.

When WHD finds violations during enforcement actions, it computes and attempts to collect and distribute back wages owed to workers and, where permitted by law, also imposes penalties and other remedies.[8] If employers refuse to pay the back wages and any penalties assessed, WHD officials, with the assistance of attorneys from Labor's Office of the Solicitor, may pursue the cases in court. When WHD finds violations under the Government Contract statutes, which includes the SCA, DBA, and Contract Work Hours and Safety Standards Act, the agency may pursue administrative action to recover wage and benefit payments and to debar the contractor from future federal contracts. WHD may also request that the federal agency withhold contract payments to protect the back wages and benefits and may request that the federal agency terminate a contract.

The National Labor Relations Act (NLRA) is the primary federal law governing relations between labor unions and employers in the private sector and is administered by the NLRB. Under Section 8 of the act,[9] it is illegal for employers to interfere with workers' right to organize or bargain collectively or for employers to discriminate in hiring, tenure, or condition of employment in order to discourage membership in any labor organization, and such behavior is defined as an unfair labor practice.[10] After concluding that a violation has been committed, the board typically requires firms to cease and desist the specific conduct for which an unfair labor practice is found. The board may order a variety of remedies, including requiring the firm to reinstate unlawfully fired workers or restore wages and benefits to the bargaining unit. In some cases, the board

[8]Penalties are fines that WHD may impose when employers violate certain labor laws or are found to have willfully or repeatedly violated certain labor laws. They are known as "civil money penalties."

[9]29 U.S.C. § 158(a) provides that it is a violation or an unfair labor practice for an employer to (1) interfere with, restrain, or coerce employees in the exercise of their rights to self-organize; (2) dominate or interfere with the formation or administration of any labor organization; (3) discriminate in hiring, or any term or condition of employment, to encourage or discourage membership in any labor organization; (4) discharge or otherwise discriminate against an employee for filing charges or giving testimony under this act; and (5) refuse to bargain collectively with the majority representative of employees.

[10]29 U.S.C. § 158(b) violations refers to unfair labor practices committed by unions. Because unions are typically not federal contractors, we did not include 8(b) violations in this report.

will also issue a broad cease and desist order prohibiting the firm from engaging in a range of unlawful conduct. If an employer to whom the federal government owes money (such as a federal contractor) has failed to comply with an order by the board to restore wages or benefits, the government has the option of withholding from any amount owed to that employer (including payments under a federal contract) any equal or lesser amount that the contractor owes under the board order.

By statute, federal agencies are required to award contracts only to "responsible" sources. This statutory requirement has been implemented in the Federal Acquisition Regulation (FAR). The FAR establishes "a satisfactory record of integrity and business ethics" as one of the general standards a prospective contractor must meet to be responsible.[11] Also, contracting officers are required to query the excluded parties list system (EPLS) to determine whether the prospective contractor has been debarred or suspended from federal contracts.[12]

Federal Government Awards Contracts to Companies with Wage Assessments and Health and Safety Citations

The federal government has awarded contracts to companies that had been cited for large back-wage liabilities by Labor. Restricting our analysis to the 50 largest WHD assessments from fiscal year 2005 through fiscal year 2009, we found that over 60 percent of these assessments were made against companies that subsequently received contracts in fiscal year 2009. Specifically, we found that 25 out of the 50 largest WHD assessments were charged to 20 federal contractors. WHD assessed these 20 federal contractors for over $80 million in back wages. According to FPDS-NG, the federal government awarded over $9 billion in federal contract obligations to these 20 contractors during fiscal year 2009. None of the 20 federal contractors had been debarred or suspended from federal contracts. Further, we do not know the extent, if any, that contracting

[11]FAR 9.104-1.

[12]To protect the government's interests, any agency can exclude, that is, suspend or debar, businesses or individuals from receiving contracts or assistance for various reasons, such as a conviction of or indictment for criminal or civil offense or a serious failure to perform to the terms of a contract. For example, under the Contract Work Hours and Safety Standards Act, Labor may debar contractors in the construction industry for "repeated willful or grossly negligent" violations of safety and health standards issued under the Occupational Safety and Health Act. A suspension is a temporary exclusion of a party pending the completion of an investigation, while a debarment is a fixed-term exclusion. Generally, the period of debarment does not exceed 3 years, though some are indefinite. 40 U.S.C. 3701 et seq.

officers considered WHD assessments in the awarding of the federal contracts.

The federal government has also awarded contracts to companies that Labor has assessed large fines against for violating health and safety regulations. From our analysis of the 50 largest OSHA fines for health and safety violations for closed investigations from fiscal year 2005 through fiscal year 2009, we found that almost 40 percent of these fines were made against companies that subsequently received federal contracts in fiscal year 2009. Specifically, we found that 8 of the 50 largest OSHA fines were made against 7 other federal contractors for safety violations. Further, these 7 companies accounted for about $3.7 million in OSHA fines. According to FPDS-NG, the federal government obligated approximately $180 million in federal contracts to these contractors during fiscal year 2009. None of the 7 federal contractors had been debarred or suspended from federal contracts. Further, we do not know the extent, if any, that contracting officers considered OSHA fines in the awarding of the federal contracts.

Currently, the inspection databases maintained by OSHA, WHD, and NLRB do not contain DUNS numbers for all their cases. The OSHA and WHD data primarily identify companies by their names and, for WHD, employer identification numbers, when they were available. These firms may incur violation citations under multiple names due to the existence of multiple subsidiaries and corporate mergers. As such, the full extent of the federal government's contracts awarded to companies with wage, health and safety, and collective bargaining violations is unknown.

Examples of Federal Contractors That Were Cited for Violating Federal Labor Laws

Each of the 15 companies we reviewed were cited for failing to follow wage, health and safety, or collective bargaining laws enforced by WHD, OSHA, and NLRB, respectively. Seven of these companies also had other types of violations, such as hiring undocumented workers, violating environmental standards, fraudulently billing Medicare and Medicaid, and billing for services not rendered. Most of these 15 federal contractors had contracts with the Department of Defense (DOD), the largest contracting agency. Other federal agencies that contracted with these companies include the Departments of Agriculture, Homeland Security, and Justice; General Services Administration (GSA); and National Aeronautics and Space Administration (NASA). According to FPDS-NG, these 15 companies received over $6 billion in federal contract obligations in fiscal year 2009. See table 2 below for detailed information on our 15 cases.

Table 2: Examples of Federal Contractors with Labor Law Citations

Case	Product or service provided	Contracting agencies	Details
1	Food supplier	Department of Agriculture (Agriculture), DOD, Department of Justice (DOJ)	• Federal agencies awarded about $500 million in federal contracts to the company during fiscal year 2009. • Over 100 OSHA health and safety violations, including 1 willful violation, since fiscal year 2005 totaling $200,000 in fines. • OSHA cited the company for one serious violation and a $7,000 fine when employee who fell into a wastewater pit containing poultry debris was fatally asphyxiated when the debris lodged into his throat in 2004. • 13 WHD investigations resulted in $30,000 in assessments for back wages since fiscal year 2005. The firm agreed to pay these assessments. • WHD determined that multiple employees were wrongfully terminated and denied thousands of dollars of pay between 2006 and 2008 for taking lawful family medical leave, including caring for a hospitalized spouse. • In 2009, a federal jury determined that the company was in violation of the Fair Labor Standards Act for failing to properly pay approximately 3,000 workers $250,000. In this case, Labor had sought $8 million. • Company officials report that the company offers health insurance to its employees.
2	Healthcare services	DOD, DOJ, Department of Health and Human Services (HHS), Department of Veterans Affairs (VA)	• Federal agencies awarded about $48 million in federal contracts to the company during fiscal year 2009. • WHD assessed $1.3 million in back wages for about 500 employees since fiscal year 2005. The firm agreed to pay these assessments. • In 2007, WHD computed approximately $250,000 in back wages when the company failed to pay overtime to hourly employees from 2004 to 2006. Although the firm agreed to pay these assessments, WHD documentation notes that the firm had a history of and was continuing attempts to avoid reporting all employees who were due back wages. • Company officials report that health benefits are offered to employees that work at least 30 hours per week.

Case	Product or service provided	Contracting agencies	Details
3	Security guard services	Department of Homeland Security (DHS), DOJ, General Services Administration (GSA), Department of Transportation (Transportation), Department of the Treasury (Treasury)	• Federal agencies awarded about $300 million to the company in federal contracts during fiscal year 2009. • WHD assessed over $3.7 million in back wages for over 2,500 employees since fiscal year 2005. The firm has agreed to pay these assessments. • WHD investigators noted that the company had a lack of regard for the Collective Bargaining Agreement (CBA) and considered debarment for the firm's history of violations; however, the firm was never debarred. • Company agreed to pay $18 million in a settlement to the U.S. government in 2007 for allegedly violating contract requirements, such as weapons qualifications, for civilian guards at eight U.S. Army bases. • Company officials report that health benefits are negotiated in the CBA and vary for each contract.
4	Security guard services	Agriculture, DHS, DOD, Department of Energy, GSA, NASA, Nuclear Regulatory Commission, VA	• Federal agencies awarded about $200 million in federal contracts to the company during fiscal year 2009. • WHD assessed $4.4 million in back wages for over 2,100 employees since fiscal year 2005. The firm has agreed to pay these assessments. • OSHA has cited the company for seven cases of health and safety violations and assessed $9,000 in penalties since fiscal year 2005. • In 2005, the NLRB ruled that the company violated the NLRA by threatening employees with the loss of the company's government contract and loss of their jobs if they formed a union. • The NLRB also ruled in 2006 that the company violated the NLRA for refusing to rehire an applicant due to his prior union activities. • The company engaged in hiring discrimination against African-Americans from January 2002 through December 2003, according to Labor. In 2010, the company agreed to pay $290,000 in back pay and interest to 446 rejected African-American job applicants. • In a 2007 testimony before a congressional committee, an inspector general discussed concerns about the firm's contract performance, including unguarded entrances, lack of training on handling toxic substances, 24-hour shifts with dozing guards, unsecured firearms and ammunition, and other problems. • The company billed a Florida county $6 million for phantom services, according to a county manager's 2008 audit report. • Company officials report that health benefits are negotiated in the CBA and vary for each contract.

Case	Product or service provided	Contracting agencies	Details
5	Petroleum-base liquid propellants and fuels	DOD	• DOD awarded about $100 million in federal contracts to the company during fiscal year 2009. • OSHA has cited the company for 18 health and safety violations, including 17 serious violations, resulting in $60,000 in fines since fiscal year 2005. • A 2008 OSHA inspection revealed that oil refinery employees were exposed to explosions and other hazards that could result in severe burns and death. In a related OSHA press release, an OSHA official stated that company management was "gambling with employees' safety" by operating unsafe equipment. In the agreement, the company denied that it violated the safety standards but settled to avoid the expense of litigation. • In 2007 the company agreed to a settlement of $400,000 in civil penalties and to spend more than $48.5 million for new and upgraded pollution controls at three refineries to resolve alleged violations of the Clean Air Act. • Company official reports that health insurance benefits are offered to all full-time employees.
6	Guard services; courier and messenger services	Agriculture, DHS, DOD, NASA	• Federal agencies awarded about $50 million in federal contracts to the company during fiscal year 2009. • WHD has assessed over $2 million in back wages to over 1,000 employees since fiscal year 2005. The firm agreed to pay these assessments. In one case, WHD investigators found that 43 security guards working on a DHS contract were "grossly being underpaid." • The company settled a civil complaint for $8,000 in 2009 for allegedly refusing to reemploy a service-disabled veteran, a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994. • Company officials refused to respond to our requests for health insurance information.
7	IT services, equipment maintenance and repair, logistics support, and other professional services	DOD, NASA	• Federal agencies awarded about $4 billion in federal contracts to the company during fiscal year 2009. • WHD has assessed $1.6 million in back wages for over 250 employees since fiscal year 2005 for not paying proper prevailing wages, holiday, vacation, and sick pay. The firm has agreed to pay these assessments. • A 2006 OSHA inspection found that employees were working in a trench over 10 feet deep without proper protection against cave-ins. OSHA documentation states that the company's leadman was aware but did not follow the excavation requirements. The firm entered into an informal agreement with OSHA and agreed to pay $40,000 in penalties. As part of the agreement, the firm did not admit to violating OSHA regulations. • Company official stated that health insurance is offered to 99 of full-time employees.

Case	Product or service provided	Contracting agencies	Details
8	Industrial and information technology manufacturing, construction and engineering	DHS, DOD	• Federal agencies awarded about $200,000 in federal contracts to the company during fiscal year 2009. • OSHA has cited the company for 17 serious violations and assessed about $95,000 in penalties since fiscal year 2005. • In 2007, an employee was killed by machinery lacking safety devices. A similar incident occurred at the same facility in 1984, but no one was injured. Company was also cited in two different 1998 inspections for not ensuring that machinery had proper safety devices. One month after the fatality, OSHA inspectors observed machinery without safety devices, risking employee injury or death. According to OSHA records, company management informed OSHA they did not know why the safety device was removed. • In settlement, OSHA cited the company for 18 violations, including potential for falling from heights, lack of adequate protective gear, improper storage of combustible equipment, and employee exposure to electric shock and combustible materials from improper maintenance. As part of the agreement, the company made no admission to violating OSHA regulations. • Company officials informed us that health insurance is offered to full-time employees that have completed 30 days of employment.
9	Electronic display and imaging technologies	DOD, Transportation	• Federal agencies awarded about $1.4 million in federal contracts to the company during fiscal year 2009. • OSHA has cited the company for 30 health and safety violations, including 2 willful and 24 serious, and $100,000 in fines since fiscal year 2005. These included a lack of eye and face protection for employees working with various acids, improper storage of combustible materials, unguarded moving machine parts, several electrical hazards, and lack of adequate first-aid supplies. In the settlement agreement related to these violations, the company did not admit to OSHA's allegations and citations. • Company had a series of chemical burn accidents and hydrofluoric acid exposure from 1999 to 2007 that led to employee hospitalization, including several burns to employees' face, chest, arms, and shoulders. • According to OSHA records, one of the plant's managers admitted that despite the history of accidental acid burns, corrective actions were not taken, citing the lack of time, personnel, and resources, despite knowledge of OSHA standards. Further, a plant manager informed OSHA that "it was not a priority" to produce a required plan that could prevent employee burns. • Company officials stated that health insurance is offered to full-time employees working 40 hours a week with 90 days of continuous employment.

Case	Product or service provided	Contracting agencies	Details
10	Industrial manufacturing, repair and maintenance	DOD	• DOD awarded about $200,000 in federal contracts during fiscal year 2009. • OSHA has cited the company for 30 health and safety violations, including 18 serious violations, and $80,000 in fines since fiscal year 2005. The company settled to pay the fines, but did not admit to the violations. • Machine operators were exposed to ongoing amputation and crushing hazards due to deficient safety devices. A 2005 accident resulted in a finger amputation caused by a safety device not meeting OSHA requirements. • In 2007, an employee sustained fatal injuries after falling approximately 12 feet from the top of an oven onto concrete floor. Management was aware of the fall risk as early as 2000, and purchased fall protection equipment for maintenance and service personnel per customer requirements, but lacked a mandatory policy for other employees, leaving use of fall protection equipment to their discretion. • OSHA observed multiple employees smoking and participating in other spark-producing activities, near designated nonsmoking areas throughout the facility, risking plant explosions, with no enforcement by management. • Company official reported that health insurance benefits are offered to all full-time, permanent employees with 60 days of continuous employment.

Case	Product or service provided	Contracting agencies	Details
11	Medical equipment, information technology services, maintenance	Agriculture, DOD, GSA, VA	• Federal agencies awarded about $4 million in federal contracts to the company during fiscal year 2009. • OSHA has cited the company for 77 health and safety violations, including 1 repeat and 65 serious violations, and fines of $140,000 since fiscal year 2005. • In one OSHA case, citations were given for failing to provide protective gear from hazardous chemicals and failure to keep work sites free from hazards that were causing or likely to cause death or serious physical harm to employees. As part of a settlement agreement, the firm agreed to take corrective actions and pay $76,000 in penalties. • WHD has assessed over $100,000 in back wages to more than 150 employees since fiscal year 2005. The firm agreed to pay these assessments. • In 2008, in a press release, an OSHA official accused the company of tolerating serious injuries, including amputations, as a cost of doing business. • In 2009, an administrative law judge ruled that the company violated the NLRA and engaged in unfair labor practices by removing a union steward from a work facility for advocating for employees. • U.S. Immigration and Customs Enforcement raid found nearly 600 undocumented immigrants working for the company in 2008. A manager at the company pleaded guilty to conspiracy and employee verification fraud for knowingly encouraging and inducing undocumented immigrants to reside in the country and knowingly concealing, harboring, and shielding these individuals from detection, and routinely accepting false identification documents. • Company agreed to pay over $475,000 in fines for several violations of environmental regulations that took place between 2004 and 2009, including failing to properly label and store hazardous waste, failing to comply with permitted waste discharge limits and violating state air regulations. • EPA has assessed penalties to company for violations of the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act. • Company officials did not to respond to repeated requests for health insurance benefits information.

Case	Product or service provided	Contracting agencies	Details
12	Automotive and industrial batteries	DHS, DOD, Energy, Department of the Interior, Social Security Administration, Transportation, Treasury, VA	• Federal agencies awarded about $15 million in federal contracts to the company during fiscal year 2009. • OSHA has cited the company for 85 health and safety violations, including over 50 serious and 13 repeat violations since fiscal year 2005 and assessed about $428,000 in fines. • According to OSHA records, the company had a number of inspections and fatalities and had been placed in the OSHA Enhanced Enforcement Program • In one OSHA enforcement case, an employee, in 2005, was fatally injured attempting to manually clear a jammed conveyor belt when his arm was caught. OSHA records cite the company's lack of machinery safety devices as a factor. Company had previously been cited for this hazard at two of the company's locations, including the one involving a fatality. According to OSHA records, employees stated safety devices were not used because of the rush to meet the production quota. In a settlement agreement relating to this case, company agreed to pay $300,000 in penalties. As part of the agreement, the company did not admit to any of OSHA's allegations. • Company officials informed us that employees not covered under a collective bargaining agreement are eligible to participate in health benefit programs offered if they are regularly scheduled to work at least 30 hours per week following 2 full calendar months of employment. Eligibility for health insurance under collective bargaining agreements is separately negotiated.
13	Furniture and fixtures	Agriculture, DHS, DOD, Interior, Transportation, VA	• Federal agencies awarded about $23 million in federal contracts to the company during fiscal year 2009. • OSHA has cited the company for over 25 health and safety violations, including 13 serious violations, and assessed about $100,000 in fines since fiscal year 2005. In a settlement agreement, the company stated that it did not admit to OSHA's citations. • OSHA inspectors found that management was aware of hazards that could lead to amputations, electrocution, lacerations, fractures, and burns. • Following a 2005 employee amputation, according to the OSHA inspection report, company management acknowledged to OSHA inspectors that machinery was not guarded to prevent employee amputations and stated that no guarding methods had been attempted. The company has been cited for this violation multiple times by OSHA inspectors. In fact, multiple company employees had sustained amputation injuries between 2003 and 2005 due to the lack of safety devices on machinery. • Company officials report that health insurance is offered to all full-time employees.

Case	Product or service provided	Contracting agencies	Details
14	Guard services, social rehabilitation services	DHS, DOJ, Interior, GSA	• Federal agencies awarded about $800 million in federal contracts to the company during fiscal year 2009. • OSHA has cited the company for five serious safety violations since fiscal year 2005. • WHD assessed about $3 million in back wages due to employees since fiscal year 2005. The firm agreed to pay these assessments. • The company violated the NLRA by unlawfully firing an employee for union participation, transferring another employee to a less desirable position because of his union activities, and unlawfully encouraging and coercing employees to decertify their union. • A complaint was filed in district court in 2008 on behalf of all corrections officers employed by the company alleging that employees were not paid for all hours worked. Company agreed to a maximum gross settlement amount of $7 million. • According to the Florida Attorney General's Office, the company improperly billed Medicaid for outside medical services provided to inmates from 2000 through 2004. In fiscal year 2006, the company settled with the state and agreed to pay about $300,000 in improper claims and penalty amounts. • Company officials reported that health insurance is offered to all full-time employees.
15	Medical and surgical supplies	Bureau of Prisoners / Federal Prison System, DOD, Indian Health Service, VA	• Federal agencies awarded about $4 million in federal contracts to the company during fiscal year 2009. • WHD assessed approximately $600,000 in back wages due to 3,000 employees since fiscal year 2005. The firm agreed to pay these assessments. • Company was ordered to pay $19 million in damages for violating the False Claims Act and for unjust enrichment after fraudulently billing Medicare for medical equipment between 1999 and 2005 through a sham company. • Company officials did not respond to our requests for health insurance benefit information.

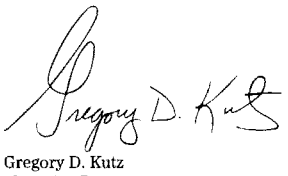
Source: OSHA, WHD, NRLB, FPDS-NG, and other sources.

Agency Comments

We provided a draft of this report to NLRB and Labor. NLRB did not have any comments on the draft report. We received technical comments from Labor, which we incorporated as appropriate.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 14 days from the report date. At that time, we will send copies to interested congressional committees, the Secretary of Labor, and the Chairman of the NLRB. The report also will be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staff members have any questions abont this report, please contact me at (202) 512-6722 or kutzg@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report.



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United States Senate
HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE
Tom Harkin, Chairman

Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk

Majority Committee Staff Report

December 11, 2013

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Executive Summary

Each year, the United States pays out over $500 billion in taxpayer dollars to private companies for goods and services, much of which is used to pay the salaries of millions of workers. Taken together, companies that receive government contracts employ an estimated 22 percent of the American workforce, approximately 26 million workers.

In recent years, the federal government has increasingly used the contracting process to procure employee-based service work such as cleaning, security, and construction. However, a new analysis shows that taxpayer dollars are routinely being paid to companies that are putting the livelihoods and the lives of workers at risk. Many of the most flagrant violators of federal workplace safety and wage laws are also recipients of large federal contracts.

Almost half of the total initial penalty dollars assessed for OSHA violations were against companies holding current federal contracts.

Some of the nation's largest federal contractors fail to pay their workers the wages they have earned or provide their employees with safe and healthy working conditions. The analysis found that almost 30 percent of the top violators of federal wage and safety laws are also current federal contractors.

Specifically:

- Eighteen federal contractors were recipients of one of the largest 100 penalties issued by the Occupational Safety and Health Administration (OSHA) of the Department of Labor between 2007 and 2012. Almost half of the total initial penalty dollars assessed for OSHA violations were against companies holding federal contracts in 2012.
- Forty-two American workers died during this period as a result of OSHA violations by companies holding federal contracts in 2012.
- Thirty-two federal contractors received back wage assessments among the largest 100 issued by the Wage and Hour Division of the Department of Labor between 2007 and 2012.
- Thirty-five of these companies violated *both* wage and safety laws.
- Overall, the 49 federal contractors responsible for large violations of federal labor laws were cited for 1,776 separate violations of these laws and paid $196 million in penalties and assessments. In fiscal year 2012, these same companies were awarded $81 billion in taxpayer dollars.

Federal law is intended to prevent taxpayer dollars from increasing the profits of companies with a record of violating federal law in two ways: by requiring contracting officers to assess a prospective contractor's responsible compliance with federal law prior to awarding a contract, and by allowing agencies to suspend or debar contractors for certain behavior, including violations of federal law, in order to protect the integrity of taxpayer dollars.

Unfortunately, this report demonstrates that the officials responsible for determining if a prospective contractor is a responsible entity prior to awarding a contract lack access to information on labor violations and lack the tools to evaluate the severity or repeated nature of these types of violations.

This is true even though the Clean Contracting Act of 2008 specifically required that a database be established to help agencies evaluate violations of federal law in making a responsibility determination. Some of the many incidents of misconduct that are not currently available to contracting officers in this database include:

- The death of a 46-year-old father of four, who was working as a washroom operator at a Cintas Corporation facility in Tulsa, Oklahoma. He was killed after being swept into an industrial dryer when he attempted to dislodge a clothes jam. The dryer continued to spin with him inside for 20 minutes at over 300 degrees. Cintas received $3.4 million in federal contracts in fiscal year 2012.

- The death of two employees of a Mississippi shipbuilding and ship repair company owned by ST Engineering Limited, who were killed when highly flammable materials being used to prepare a tugboat for painting ignited, leading to an explosion and fire. Findings of the investigation included failure to properly ventilate a confined space and lack of a rescue service available for a confined space. ST Engineering received $1.9 million in federal contracts in fiscal year 2012.

- The deaths of seven workers at an Anacortes, Washington refinery owned by Texas based Tesoro Corporation, who were killed when a heat exchanger ruptured and spewed vapor and liquid that exploded. The workers who died were standing near the area of the rupture specifically to attempt to stop leaks of the volatile, flammable gases in the facility which had not been inspected for 12 years prior to the rupture. Tesoro received $463 million in federal contracts in fiscal year 2012.

These breakdowns in the ability to access and evaluate information in the contracting process effectively ensure that even repeated and serious violations of federal labor laws, like those described above, do not factor into contracting decisions.

The federal government is not required to contract with the private sector. Indeed, many of the functions that private contractors carry out for the government could be done equally well or better by government employees. But, when the government does solicit work from the private sector, it should use taxpayer dollars in a way that promotes compliance with federal law and improves the quality of life for working Americans.

Ensuring that the government contracts with actors who do not engage in serious or repeated violations of federal labor law is one important step to further that goal. Recommendations that will better protect taxpayer dollars and promote compliance with laws that protect the lives and livelihoods of American workers by those who receive taxpayer money include:

- Improvements in the quality and transparency of Department of Labor information regarding violations of federal law.

- Publication of an annual list of federal contractors that were assessed penalties or other sanctions, and as well as additional information concerning contractor compliance with labor law by the Department of Labor.

- Improvement of contracting databases administered by the General Services Administration including increasing public transparency and expanding the amount of misconduct information included in those databases.

- Issuance of an Executive Order requiring contracting officers to consult with, and obtain recommendations from, a designated official at the Department of Labor about violations of federal labor law when making responsibility determinations.

- Issuance of an Executive Order to establish additional tools – beyond the existing responsibility determination and suspension and debarment process – that contracting officers, in consultation with the Department of Labor, can use to ensure that contractors comply with federal labor law.

Introduction

While much attention is given to the role of the federal government as a direct employer of millions of Americans, few consider the impact the federal government has on the labor market as a purchaser of goods and services from the private sector. Each year, the federal government purchases more than $500 billion in goods and services from the private sector, and according to some estimates, firms that contract with the federal government employ approximately 22 percent of the entire workforce.[1]

The amount of taxpayer dollars spent on contracts has more than doubled since 2000, with most of the growth occurring in the area of contracts for services. In fiscal year 2000, contracts for services totaled $99 billion while contracts for goods totaled $167 billion. By fiscal year 2012, contracts for services totaled $307 billion and contracts for goods totaled $210 billion.[2] Services purchased include weapons development and assembly, human resource services, health care, information technology systems development and implementation, and a wide range of service-employment such as janitorial services, call centers and security services.

Ensuring compliance with federal labor laws in order to protect and improve the welfare and working conditions of all Americans is an issue of ongoing concern to the HELP Committee and to Chairman Harkin. The tremendous growth of service-based contracts, in which taxpayer dollars pay the salaries of an increasing number of private sector employees, makes it especially critical that the federal government have sound mechanisms in place to ensure that taxpayer dollars are supporting workplaces that are in compliance with federal labor laws. Absent those mechanisms, taxpayer dollars may increasingly be provided to companies that fail to pay their workers what they have earned or subject those workers to potentially unsafe working conditions.

An investigation by HELP Committee majority staff found that the federal government currently lacks effective mechanisms to prevent agencies from entering into contracts with companies that violate federal labor laws. An analysis of largely public information demonstrates that almost thirty percent of the companies that received the largest penalties and/or back pay awards for violating laws enforced by the Wage and Hour Division (WHD) and the Occupational Health and Safety Administration (OSHA), over a six-year period, are also simultaneously recipients of billions of dollars of federal contracts.

Granting private companies the ability to enter into contracts with the United States gives the government the opportunity to promote and expand policies that it supports. For example, as early as 1943, more than 20 years before passage of the Civil Right Act, President Roosevelt issued an Executive Order that required all federal contractors to include a non-discrimination clause on the basis of race, color, creed, and national origin, an effort that was built upon by each future Administration and which helped to increase the speed with which businesses took steps to address discrimination and ensure equal

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[1] ANN O'LEARY, CTR. FOR AM.PROGRESS & UC BERKELEY SCHOOL OF LAW, MAKING GOVERNMENT WORK FOR FAMILIES, (July 2009), http://www.law.berkeley.edu/files/Making_Govt_Work_for_Families_-_Final-1.pdf.

[2] PROJECT ON GOVERNMENT OVERSIGHT, "Testimony of POGO's Scott Amey on Using the Suspension and Debarment System Effectively to Avoid Risky Contractors," June 12, 2013, http://www.pogo.org/our-work/testimony/2013/testimony-of-pogos-scott-amey-on-suspension-debarment.html#en4 (citing http://www.USAspending.gov).

employment opportunities for all Americans.[3] Since issuance of Executive Order 11246 in 1965 banning discrimination by federal contractors it has been clear that requirements do not just protect against discrimination in the workplace for those who work on federal contracts, it requires non-discrimination even when the employee's work does not involve a federal contract. In doing so, these requirements helped to set standards across the economy, including at firms that had no direct business relationships with the federal government.[4]

Similarly, by requiring that companies seeking contracts with the government have demonstrable records of compliance with laws that promote safe and fair workplaces, the government can raise standards across the economy and better ensure that companies wishing to receive contracts have high quality employment policies for all of their employees, not just those working directly on a contract.

As an initial matter, the rapid growth in service contracts raises the question of whether the federal government is contracting out services that would be better handled by federal employees. One of the best ways to ensure that work is done in compliance with federal law is to require the work be performed by federal employees, who have established mechanisms in place to address workplace concerns. But when the government decides it is best served by contracting out particular services, the best way to protect that investment of taxpayer dollars is to ensure that contracts are awarded to firms committed to abiding by the law. Yet this report finds that, contrary to this basic principal, the federal government continues to purchase goods and services from companies that are among the worst and most frequent violators of federal labor law.

[3] Office of Federal Contract Compliance Programs, "Facts on Executive Order 11246," http://www.dol.gov/ofccp/about/History_EO11246.htm

[4] Office of Federal Contract Compliance Programs, "History of Executive Order 11246, http://www.dol.gov/ofccp/regs/compliance/aa.htm; http://www.dol.gov/ofccp/about/History_EO11246.htm

The Problem: The Federal Government Frequently Contracts with Companies that Violate Federal Labor Laws

The Contracting Process

As a general matter, in order to ensure that taxpayer dollars are used wisely, the federal government awards contracts to the lowest-priced or best value qualified bidder. However, the Federal Acquisition Regulation (FAR) stipulates that "no purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility." Thus, while price/value is one attribute of a bid, responsibility is a separately required attribute of the firm that submits the bid, and a contractor found to be non-responsible is ineligible to receive the proposed contract.[5]

The contracting officer at the relevant agency is the individual tasked with making the determination as to whether a firm submitting a bid is a responsible party. In doing so, a contracting officer conducts two separate, but similar, evaluations. First, the contracting officer will determine whether or not the prospective contractor is ineligible to receive a contract as a result of an active suspension or debarment. Second, a contracting officer is required to verify that the prospective contractor is responsible, meaning that the prospective contractor demonstrates a "satisfactory record of integrity and business ethics."[6]

While this term lacks precise definition, in general, to make such a finding of responsibility, a contracting officer may consider convictions or indictments of corporate officers, integrity offenses, violations of state law, or pending debarments in other jurisdictions, among other factors. Traditionally, contracting officers have largely relied upon a prospective contractor's previous performance in administering prior federal contracts. Contracting officers gain access to this information through a confidential database called the Past Performance Information Retrieval System (PPIRS), currently housed at the General Services Administration (GSA). PPIRS typically contains information about whether previous contracts were completed according the specified time frames and prices, but does not generally contain information regarding legal violations or integrity offenses.[7]

In 2008, the Clean Contracting Act specifically required the creation of an additional database for contracting officers to consult in evaluating a prospective contractor's compliance with federal law as part of a responsibility determination.[8] However, as explained in more detail below, five years later, the database fails to provide contracting officers with the information or the tools to properly learn of and evaluate violations of federal labor law.

Additionally, a federal contracting agency may suspend or debar a company during or after completion of a contract based upon evidence that the contractor has committed certain offenses. This is typically a more severe sanction than a finding that a company is not presently responsible. While some federal laws, such as the Service Contract Act and Davis Bacon Act, include provisions that provide agencies

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[5] KATE M. MANUEL, CONG. RESEARCH SERV., RESPONSIBILITY DETERMINATIONS UNDER THE FEDERAL ACQUISITION REGULATION 1 (2013), http://www.fas.org/sgp/crs/misc/R40633.pdf.

[6] 48 C.F.R. § 9.104.

[7] Committee staff was unable to access PPIRS because it is not publicly available.

[8] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008).

with the ability to suspend or debar a contractor for a violation of that statute, agencies also retain discretionary debarment authority. In general, agencies may suspend or debar a contractor for any "offenses indicating a lack of business integrity or business honesty that seriously affect the present responsibility of a contractor." Debarment may also be imposed when the head of an agency finds, by a preponderance of the evidence, that there exists "any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor."[9]

However, because a contractor that has been suspended or debarred is prohibited from receiving contracts during the period for which they are suspended or debarred, and because the process is cumbersome and subject to challenge, such remedies are rarely employed. In fact, unless the Department of Labor has debarred or suspended a contractor as a result of its statutory authority under the Service Contract Act or Davis Bacon Act, it does not appear that the Department of Labor has ever suspended or debarred a contractor as a result of a diseretionary finding that a federal contractor has a record of non-compliance with wage or safety and health laws.[10]

These two mechanisms, the pre-award responsibility determinations and the presentation of evidence of offenses leading to suspension or debarment, are the principal methods that the federal government uses to ensure the companies with whom it contracts will be good stewards of taxpayer dollars. Unfortunately, both processes suffer from flaws that allow taxpayer dollars to be awarded to companies that do not abide by federal labor law.

Large-Scale Violations of Federal Labor Laws by Companies Holding High-Value Federal Contracts

Over the last two decades, a number of studies have revealed that the federal government has entered into contracts with companies that had previously been cited for violations of federal labor laws. As early as 1995, a Government Accountability Office (GAO) study found that 80 companies that had received $23 billion in federal contracts, about 13 percent of the contracts awarded in fiscal year 1993, had also violated the National Labor Relations Act.[11] In 2010, the GAO determined that the federal government routinely enters into contracts with companies that had previously been cited for violating federal labor laws, including wage and hour laws and occupational safety and health laws.[12] That report determined that 25 of the top 50 back pay awards assessed between 2005 and 2009 were assessed against federal contractors, while 8 of the top 50 health and safety penalties were similarly assessed against companies holding federal contracts.

Because of these findings, HELP Committee staff sought to better understand the frequency with which contracts are entered into with companies with a public record of federal labor law violations, and to understand the seriousness of those violations. To do so, Committee staff analyzed penalties assessed by the Department of Labor for violations of the health and safety standards of the Occupational Safety and

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[9] 48 C.F.R. §9.406-2(c).

[10] The Department of labor does debar companies who violate the Service Contract Act or the Davis Bacon Act. See Alan Berman Trucking; USprotect; Cal Construction.

[11] U.S. GEN. ACCOUNTING OFFICE, FEDERAL CONTRACTORS AND VIOLATIONS OF LABOR LAW GAO/HEHS-96-8 5 (1995), http://www.gao.gov/assets/230/221816.pdf.

[12] U.S. GOV. ACCOUNTABILITY OFFICE, ASSESSMENTS AND CITATIONS OF FEDERAL LABOR LAW VIOLATIONS BY SELECTED FEDERAL CONTRACTORS GAO-10-1033 8 (2010), http://www.gao.gov/new.items/d101033.pdf.

Health Act, and failure to pay overtime and other wage violations leading to the award of back pay under the Fair Labor Standards Act and other statues enforced by the Wage and Hour Division. Companies responsible for any of the 100 largest safety and health related penalties, ordered by the amount of initial penalties assessed, or 100 largest back pay awards, ordered by the amount of back wages the company agreed to pay, over a six-year period from 2007-2012, were then cross referenced to determine if they held significant federal contracts (in excess of $500,000) in fiscal year 2012.[13]

The Committee staff found that 58 of the 200 largest penalties for violations of the health and safety standards, or the largest back pay awards, were assessed against large government contractors. As a number of companies were responsible for more than one of these violations, this meant that there were a total of 49 companies who were amongst the largest violators of safety and health or wage laws that were also large federal contractors.[14] Furthermore, a number of these companies were responsible for additional violations of federal labor law – though they were not among the 100 largest penalties – including violations of both safety and health and wage laws.

49 federal contractors amassed a startling 1,776 separate enforcement actions in six years.

Overall, when enforcement actions were tracked according to corporate ownership, the 49 federal contractors amassed a startling 1,776 separate enforcement actions in six years. These 49 companies, which received $81 billion in federal contracts in fiscal year 2012 alone, were assessed a total of $196 million in penalties for neglecting to pay workers earned wages or failing to uphold safe working conditions.

The fact that a company is among the recipients of one of the largest wage or safety penalties does not suggest that any particular company is not responsible or that a company should have limitations placed on its ability to obtain contracts. Rather, the record of non-compliance laid out below suggests that not enough is being done to ensure that compliance with multiple labor laws is being tracked, considered or evaluated as a part of the contracting practice. While the companies that appear below are those that publicly available enforcement data indicates have some of the worst records of compliance with labor laws, more needs to be done to evaluate the gravity, severity and repeated nature of violations to determine if a particular company is indeed a responsible actor.

Occupational Safety and Health Violations

The Department of Labor investigates violations of the standards governing workplace health and safety and assesses initial penalties. Cases involving violations that are willful or serious result in higher penalties. An analysis of cases that resulted in the highest initial penalties between 2007 and 2012 demonstrates that federal contractors are frequently among the largest violators of federal laws governing workplace health and safety. In fact, 18 companies that received large federal contracts were responsible

[13] Cases that were analyzed received a final determination (WHD) or an initial penalty assessment (OSHA) between 2007-12. In a number of instances, the conduct leading to the penalty or assessment occurred prior to the six year period analyzed.

[14] Although there were 18 federal contractors responsible for 23 of the largest initial penalties imposed by OSHA, and 32 federal contractors responsible for 35 of the largest back pay awards, General Dynamics appears on both lists, meaning that there were a total of 49 companies who were amongst the largest violators of safety and health or wage laws.

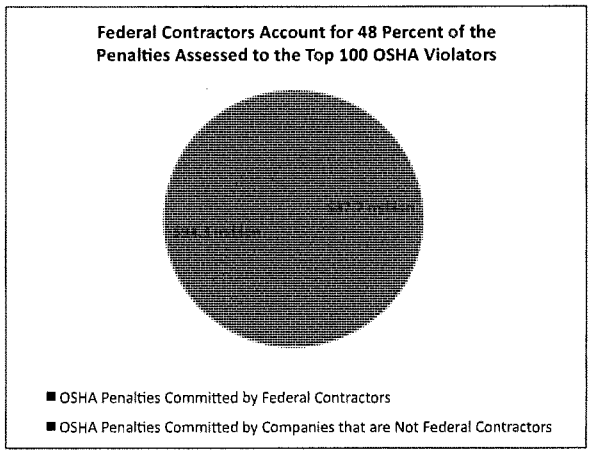
for 23 of the 100 largest initial penalties imposed by OSHA -- penalties totaling $87.7 million during that time.[15] The 18 companies responsible for these violations received approximately $22.8 billion in federal contracts in 2012.

Table A: Largest Safety and Health Initial Penalties Assessed Against 18 Companies Receiving Federal Contracts, 2007-2012[16]			
Parent Company (Entity named in OSHA Enforcement Action)	**Initial Penalties**	**Final Penalties**	**Federal Contracts 2012**
BP PLC (BP Products North America, Inc.)	$30.7 million	Open	$1,962.1 million
BP PLC (BP Products North America, Inc.)	$21.1 million	$21.2 million	$1,962.1 million
Louis Dreyfus Group (Imperial Sugar Company; Imperial-Savannah, LP)	$5.1 million	$4.2 million	$94.8 million
Louis Dreyfus Group (Imperial Sugar Company; Imperial-Savannah, LP)	$3.7 million	$2.0 million	$94.8 million
Tyson Foods, Inc. (Tyson Meats, Inc.)	$3.1 million	$0.5 million	$555.5 million
BP PLC (BP Prod. N. America Inc.&BP-Husky Refining LLC)	$3.0 million	Open	$1,962.1 million
Cintas Corporation	$2.8 million	$2.5 million	$3.4 million
General Motors Company (CPCG Oklahoma City Plant-General Motors Corp)	$2.8 million	$2.8 million	$393.8 million
BP PLC (BP Products North America Inc.)	$2.5 million	$2.4 million	$1,962.1 million
Tesoro Corporation (Shell Anacortes Refining)	$2.4 million	Open	$463.0 million
Chrysler Group LLC (Daimler Chrysler Corporation)	$1.3 million	Open	$191.2 million
ST Engineering Ltd (VT Halter Marine, Inc.)	$1.3 million	$1.3 million	$1.9 million
Daikin Industries, Ltd. (Goodman Manufacturing Company, L.P.)	$1.2 million	Open	$1.7 million
Beef Products, Inc.	$1.1 million	$0.6 million	$3.6 million
Maxwell Farms and Seaboard Corporation (Butterball Turkey Company)	$1.0 million	Open	$17.4 million
Aegion Corporation (Insituform Technologies USA, Inc.)	$0.8 million	$0.7 million	$10.0 million

[15] The top 100 OSHA penalties represent 8.3 percent of the total OSHA penalties assessed during this time frame.
[16] In at least three instances Committee staff found discrepancies between the information contained in the Department of Labor database and the Department of Labor's public statements on the enforcement action which contained the more correct figures.

Table A: Largest Safety and Health Initial Penalties Assessed Against 18 Companies Receiving Federal Contracts, 2007-2012[16]			
Parent Company (Entity named in OSHA Enforcement Action)	**Initial Penalties**	**Final Penalties**	**Federal Contracts 2012**
Americold (Americold Logistics LLC)	$0.7 million	Open	$8.1 million
Huntington Ingalls Industries, Inc. (Avondale Industries Inc., Steel Sales Div.)	$0.7 million	Open	$4,115.1 million
The Toro Company	$0.5 million	<$0.1 million	$2.9 million
Parker-Hannifin Corporation (Parker Hannifin Corporation)	$0.5 million	$0.3 million	$4.1 million
Total S.A. (Bostik, Inc.)	$0.5 million	Open	$418.3 million
General Dynamics Corporation (Bath Iron Works)	$0.4 million	$324,000	$14,577.1 million
Total S.A. (Bostik, Inc.)	$0.4 million	Open	$418.3 million
Total	**$88 million**	**$39 million**	**$22,825 million**

Three companies, BP PLC (BP), Louis Dreyfus Group (Imperial Sugar), and Total S.A., committed multiple large violations of OSHA requirements. In total, almost half of the total initial penalty dollars assessed for OSHA violations were against companies holding current federal contracts.



In many cases, violations of workplace safety laws by federal contractors had severe consequences for American families. Altogether, as the direct result of the failure to provide their employees with safe working conditions, eight of the federal contractors above, were found to be responsible for the deaths of forty-two American workers, and the severe injuries of many others in the six year period examined. Despite these tragic incidents, taxpayers provided $3.4 billion in contracts to these companies in 2012.

Although eight of the 18 contractors above were involved in workplace fatalities, BP is the *only* contractor to be suspended or debarred. Moreover, while BP was suspended for a period of at least 18 months beginning in November 2012, the suspension was the result of the catastrophic environmental damage caused by the Deep Water Horizon explosion and leak.[17] Indeed, OSHA lacked jurisdiction over the 11 offshore deaths and many injuries that resulted from the Deep Water Horizon explosion.[18] Although the suspension does not affect current contracts held by BP, in August 2013, BP nonetheless filed suit contesting the suspension from new contracts, in part claiming that other subsidiaries of BP that were not involved in the Deep Water Horizon incident should continue to be eligible to receive federal contracts.[19]

BP appears to have faced no limitations on its ability to obtain future contracts as a result of the 15 deaths and 170 injuries caused by a 2005 Texas City, Texas refinery explosion. Re-inspection in 2009 found that the company failed to correct potential hazards faced by employees.

Similarly, BP appears to have faced no limitations on its ability to obtain future contracts following the 15 deaths and 170 injuries caused by a 2005 Texas City, Texas refinery explosion.[20] Although the OSHA investigation of the Texas City Refinery explosion led to an agreement with BP to pay a $21.3 million penalty and undertake a number of corrective actions designed to make the refinery safer, re-inspection in 2009 found that the company failed to correct potential hazards faced by employees. OSHA then imposed a new fine of $87 million, which included $30.7 million as a result of 439 new willful violations.[21] Additionally, in two separate inspections in 2006 and 2009, OSHA imposed fines of $2.4 million and $3 million on an Ohio based refinery owned by BP as a result of similarly unsafe conditions to those found in Texas City.[22]

In the case of clothing manufacturer Cintas, Eleazar Torres Gomez, a 46-year-old father of four, was working as a washroom operator at a facility in Tulsa, Oklahoma, when he noticed a clothes jam on the conveyor that feeds clothing into the dryer. Attempting to dislodge the jam, he climbed onto the conveyor belt and jumped on top of the clothes. He was then swept into the dryer, which continued to spin for 20

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[17] Additionally, in February of 2013 the EPA took further action under the Clean Water Act to issue a "mandatory debarment" against BP Exploration and Production, Inc,.

[18] Jurisdiction over the Deep Water Horizon explosion rested with the Coast Guard and the Bureau of Ocean Energy Management, Regulation and Enforcement.

[19] *BP Sues US Over Contract Suspensions,* N.Y. TIMES, August 14, 2013, http://www.nytimes.com/2013/08/15/business/global/bp-sues-us-over-contract-suspensions.html.

[20] Additionally, BP entered into a $4 billion criminal settlement in January 2013 and ongoing litigation determining damages under the Clean Water Act.

[21] These 439 violations were attributed to one enforcement action.

[22] Since 2008 this refinery has been 50 percent owned by BP and Husky Energy.

minutes at over 300 degrees before a supervisor heard a noise and opened the dryer to investigate. Emergency responders pronounced him dead at the location.

OSHA found 46 violations at the plant, among them, failure to protect employees from being pinned by the conveyer belt, failure to have a proper procedure to shut down equipment when clearing jammed clothing, and failure to train workers on how to clear jams.[23] Edwin G. Foulke Jr., the Assistant Secretary of Labor in charge of OSHA at the time of the settlement stated, "Plant management at the Cintas Tulsa laundry facility ignored safety and health rules that could have prevented the death of this employee."

In 2010, seven workers were killed at an Anacortes, Washington refinery owned by Texas based Tesoro Corporation when a heat exchanger ruptured and spewed vapor and liquid that exploded. Inspectors determined the accident was caused when a 40-year-old steel heat exchanger, which had not been properly inspected since 1998, ruptured and spewed vapor and liquid that immediately exploded. All seven workers who died were standing near the exchangers specifically to attempt to stop leaks of the volatile, flammable gases.

Eleazar Torres Gomez ... was then swept into the dryer, which then continued to spin for 20 minutes at over 300 degrees before a supervisor heard a noise and opened the dryer to investigate.

In another instance, in late 2009, two employees of Mississippi shipbuilding and ship repair company VT Halter, a subsidiary of VT Systems that is owned by ST Engineering Limited, were cleaning the hull of a tugboat in preparation for painting. The highly flammable materials ignited, leading to an explosion and fire killing Dwight Monroe, 52, and Alex Caballera, 25. The subsequent OSHA investigation found 17 willful violations and 11 serious safety violations by VT Halter, leading to a $1.3 million fine. Willful violations included failure to inspect and test the confined space prior to entry, failure to prevent entry into confined spaces where concentration of flammable vapors exceed the prescribed limits, and failure to use explosion-proof lighting in a hazardous location. The serious violations included a lack of machine guarding, allowing the use of defective electrical equipment, failing to use approved containers for disposing flammable liquids, the lack of a rescue service available for a confined space entry, failure to properly ventilate a confined space, and missing or incomplete guardrails. According to then-Labor Secretary Hilda Solis, "This was a horrific and preventable situation. The employer was aware of the hazards and knowingly and willfully sent workers into a confined space with an explosive and toxic atmosphere."

Tyson Foods, Inc., a company that holds federal contracts to provide poultry, beef and other products to the United States Department of Agriculture and to the Department of Defense, was also responsible for the death of eleven American workers in the period examined. In addition, the company has a troubling record of repeat OSHA violations, including multiple incidents involving additional fatalities. Those violations include:

- July 1999: Two employees died in a raw meat waste bin. The first worker fell in while attempting to retrieve a container, and the second worker fell while attempting to rescue him. Both employees were asphyxiated.

[23] These 46 violations were attributed to one enforcement action.

- October 2003: An employee was repairing a leak on a machine that cooks down poultry feathers, a process that creates hydrogen sulfide gas. The worker was killed from exposure to the gas while another employee and two paramedics were treated for exposure.
- October 2004: An employee slipped and fell into a waste water pit he had been clearing of poultry grease and debris. The worker was fatally asphyxiated when debris lodged in his throat.
- September 2009: An employee was cleaning grain build up when the ladder he was using slipped and fell from beneath him. The smooth metal floor of the grain bin was covered in grain dust and debris. The worker fell to his death.
- December 2010: An employee was killed when a full corn silo collapsed, engulfing him in 9.2 million pounds of corn. No safety inspection of the silo had been conducted in the previous 10 years.

There is no evidence that any of these incidents were considered by contracting officers, who have subsequently awarded Tyson Foods with $4.2 billion in federal contracts since 2000.

Severe Violator Enforcement Program

In June 2010, OSHA took a positive step forward by initiating a new program to identify companies that have repeated serious violations of health and safety standards. The OSHA Severe Violator Enforcement Program (SVEP) list includes any companies "who have demonstrated recalcitrance or indifference to their Occupational Safety and Health Act obligations by committing willful, repeated, or failure-to-abate violations in one or more of the following circumstances: (1) a fatality or catastrophe situation; (2) in industry operations or processes that expose employees to the most severe occupational hazards and those identified as "High-Emphasis Hazards," (3) exposing employees to hazards related to the potential release of a highly hazardous chemical; or (4) all egregious enforcement actions."[24] Because the program has only been in effect for the previous two years, it does not currently provide a comprehensive list of severe violators of workplace health and safety laws. However, eight of the 321 entries that appear on the list involved violations by federal contractors that received almost $637 million in federal contracts in 2012.

Table B: Federal Contractors That Are "Severe Violators" of Health and Safety Standards, 2007-2012

Company	Penalty	Reason	Federal Contracts 2012
Bridgford Foods Corp	$184,000	Willful and Repeated	$0.9 million
Bridgford Foods Corp	$212,000	Willful and Repeated	$0.9 million
CHS Inc. (Cenex Harvest States)	$229,000	Willful and Repeated	$31.0 million
Johnson Controls, Inc.	$188,600	Willful and Repeated	$162.1 million
Tyson Foods	$104,200	Willful	$555.5 million

[24] U.S. DEP'T OF LABOR, *OSHA Trade News Release: OSHA's Severe Violator Enforcement Directive Effective June 18* (June 18, 2010), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17886.

Table B: Federal Contractors That Are "Severe Violators" of Health and Safety Standards, 2007-2012			
Company	**Penalty**	**Reason**	**Federal Contracts 2012**
Verizon Communications, Inc.	$140,000	Repeated	$487.8 million
Bartlett and Company	$406,000	Willful	$16.3 million
Blackstone Group LP (Sea World of Florida)	$75,000	Willful	$80.3 million
Total	**$1,538,800**		**$1,333.8 million**

Despite the fact that some of the largest penalties, including willful and serious violations that resulted in a large number of worker fatalities, have been assessed against federal contractors, it is unclear that any of this information is currently being considered in ongoing bids for federal contracts by these companies. There is no evidence that any agency has acted to make a determination that a specific contractor is not a responsible entity or to suspend or debar any of these firms as a result of their status as a severe violator of workplace health and safety laws.

Wage and Hour Back Pay Awards

In addition to ensuring compliance with safety and health standards, the Department of Labor is also responsible for ensuring that employees are paid appropriate wages and overtime as well as required benefits under the Fair Labor Standards Act, the Davis-Bacon Act, and the Service Contract Act. The Wage and Hour Division of the Department of Labor investigates claims that employees are being improperly compensated and engages in discussions with company representatives leading to settlement or litigation, either of which can result in a back pay award. A review of the most significant back pay awards reveals a troubling overlap between companies that receive large federal contracts and companies that fail to properly compensate their employees.

Of the 100 largest back pay awards during the period examined, 35 awards were assessed against companies that held federal contracts. Moreover, more than 40 percent of the total amount of unpaid back wages can be attributed to 32 companies receiving federal contracts.[25]

Three companies, URS Corporation, Nestlé S. A., and Lockheed Martin Corporation, received two *separate* back pay assessments that were among the highest issued during the six year period examined. UnitedHealth Group and C&S Wholesale Grocers were similarly assessed large back pay awards as well as civil monetary penalties.

[25] The top 100 WHD penalties represent 15 percent of total WHD penalties during this period.

Table C: Largest Back Wage Assessments Against 32 Companies Receiving Federal Contracts, 2007-2012[26]		
Parent Company (and Company Responsible for Violation)*[27]	**Back Wages Assessed**	**Federal Contracts 2012**
Management and Training Corporation (Management & Training Corp.)*	$20,998,873	$347.8 million
Hewlett-Packard Company (Electronic Data Systems, Inc.)	$5,365,982	$2,814.4 million
ManpowerGroup Inc. (Manpower, Inc.)*	$4,886,877	$3.9 million
AT&T Inc. (Cingular Wireless, LLC)	$4,711,767	$620.6 million
URS Corporation (Washington Demilitarization Company LLC)	$4,268,624	$4,138.2 million
General Dynamics Corporation (Vangent, Inc.)*	$2,976,667	$14,577.1 million
Telos Corporation**	$2,880,033	$172.7 million
Nestlé S.A. (Nestle USA)	$2,750,840	$231.7 million
G4S PLC (Wackenhut Services Incorporated)*	$2,541,364	$551.6 million
Lockheed Martin Corporation (Sandia Corporation)	$2,023,671	$35,812.7 million
CVR Energy, Inc. (CVR Energy, Incorporated)	$1,792,837	$243.5 million
Cerberus Capital Management, L.P. (I.A.P. World Services, Inc.)*	$1,788,002	$365.7 million
Nestlé S.A. (Nestle USA, Inc.)	$1,750,840	$231.7 million
Dismas Charities, Inc.	$1,687,882	$28.8 million
Delta-21 Resources, Inc.*	$1,674,340	$0.8 million
URS Corporation	$1,580,037	$4,138.2 million

[26] Public entities that were assessed large backpay awards were not included in the analysis but can be found in Appendix 2. Those entities included the Puerto Rico Department of Corrections and the Puerto Rico Police.

[27] Back pay assessments against companies noted with an * above indicate instances where the contracting agency failed to include the required Service Contract Act language in the contract or failed to provide accurate guidance with regard to the requirements of the Service Contract Act, and as a result may have reimbursed the contracting company for the back wage assessment. Back pay assessments against companies noted with an ** above indicate instances where the contracting agency failed to include the required Davis-Bacon Act language in the contract or failed to provide accurate guidance with regard to the requirements of the Davis-Bacon Act.

Table C: Largest Back Wage Assessments Against 32 Companies Receiving Federal Contracts, 2007-2012[26]		
Parent Company (and Company Responsible for Violation)*[27]	**Back Wages Assessed**	**Federal Contracts 2012**
Serco Group PLC (S.I. International, Inc.)	$1,559,978	$573.1 million
Computer Sciences Corporation	$1,448,506	$3,862.0 million
CGI Group Inc. (Stanley Associates, Inc.)*	$1,359,888	$562.8 million
Danaher Corporation (Beckman Coulter, Inc.)	$1,114,492	$141.3 million
Warburg Pincus, LLC (Rural/Metro Corporation)[28]	$1,109,697	$4.1 million
JBS S.A. (Pilgrim's Pride Corporation)	$1,001,438	$59.9 million
Ball Corporation (Ball Aerospace and Technologies Corp)	$976,327	$336.3 million
Husky Energy Inc. (Husky Energy, Inc./Lima Refining Company)	$969,182	$109.8 million
Olympus Corporation (Olympus Corporation of the Americas)	$956,773	$71.3 million
UnitedHealth Group Incorporated (United HealthCare Services, Inc.)	$934,551	$276.5 million
The Home Depot, Inc. (THD At-Home Services, Inc.)	$920,939	$1.0 million
Vanderbilt University (Vanderbilt Police Department)	$845,705	$30.8 million
Southwest Research Institute	$843,965	$163.1 million
Kinder Morgan (Kinder Morgan, Inc.)	$754,829	$3.8 million
Reynolds Group Holdings Limited (Pactiv Corporation)	$753,836	$37.2 million
Teltara LLC[29]	$731,161	$3.6 million
Lockheed Martin Corporation (Lockheed Martin Operations Support, Inc.)	$723,685	$35,812.7 million
C&S Wholesale Grocers, Inc.	$714,564	$1.7 million
L-3 Communications Holdings, Inc. (L-3 Communications Vortex Aerospace, LLC)	$713,947	$6,970.7 million
Total	**$82.1 million**	**$73,118.6 million**

[28] In August 2013, Rural/Metro filed for Chapter 11 reorganization.
[29] In November 2012, Teltara was debarred for 3 years.

Several companies that received large back pay assessments as a result of violations of the Service Contract Act or the Davis Bacon Act are not included because they did not have at least $500,000 of federal contracts in fiscal year 2012 or did not receive federal contracts at all in fiscal year 2012. In at least two instances, prior violations of the Service Contract Act or Davis Bacon Act resulted in the company being debarred by the Department of Labor.[30] In the cases in which a company was debarred, the Department of Labor made that determination based on its statutory authority stemming from provisions in the Service Contract Act or Davis Bacon Act. It does not appear that the Department has ever exercised discretionary debarment authority with regard to any violation of either occupational safety and health laws or other statutes enforced by the WHD.

The companies that received the largest back pay assessments include some of the nation's largest federal contractors, and together these companies held $73.1 billion in federal contracts in 2012. For example, HP Enterprises, the consulting arm of Hewlett-Packard Company (which acquired Electronic Data Systems in 2008), holds more than $2 billion in federal contracts and operates call centers, insurance claims processing, payroll operations, and large scale technology upgrades work on behalf of the Navy, the Department of Veterans Affairs and other agencies. URS Corporation has more than 50,000 employees, many of whom work on federal contracts including nuclear and other weapons clean-up, national lab management, federal construction projects, and base related construction and maintenance. G4S (parent of G4S Secure Solutions, formerly Wackenhut) is possibly the largest private security provider in the world.[31] Cerberus Capital Management, L.P., the owners of IAP Worldwide Services, provides operations support for the Naval Academy, power and operations to U.S. bases and detention centers in Guantanamo Bay, Cuba, and Kandahar, Afghanistan, as well as disaster services relief for FEMA and the Army Corps of Engineers. Together these companies employ millions of American workers who are indirectly paid by taxpayers, yet these companies received some of the largest fines for failure to compensate their employees in accordance with federal wage laws.

Violations leading to the back pay awards sometimes impacted thousands of employees. The Department of Labor's investigation of Cingular Wireless, LLC, documented practices at numerous call centers across the country where more than 1,400 employees were required to perform significant work functions both before and after the period for which they were being paid, leading to $4.7 million in back wages. Dismas Charities, Inc., a contractor of the Federal Bureau of Prisons that provides halfway houses for recently released prisoners, failed properly to classify *all* of its case managers, counselors, social service coordinators and employment specialists, leading to $1.7 million in back pay. In two separate instances, URS Corporation was required to pay large back wage awards for failure to pay employees for time spent donning protective gear. URS also appears to have been repeatedly investigated for violations of both the Fair Labor Standards Act and the Service Contract Act. In fact, just in the five years examined, URS and its subsidiaries have been required to pay back wages in 18 separate instances totaling $6 million in back wages for 1,299 workers.

While most wage and hour law violations result in assessments of back pay to the impacted workers, in cases of serious or willful conduct, the Department will issue civil monetary penalties. During the period

[30] Alan Berman Trucking was debarred following a Service Contract Act violation of $824,000; USprotect was recommended for debarment following Service Contract Act violations of $758,000 and $709,000 but declared bankruptcy; Cal Construction was debarred following a Davis-Bacon violations of $1.3 million.
[31] G4S is the British-based owner of Wackenhut which as of 2010 became known as G4S Secure Solutions (USA).

at issue, penalties were assessed against six separate companies that received federal contracts in fiscal year 2012, all of which engaged in either repeated or willful violations.

Table D: Federal Contractors Assessed Civil Penalties for Severe and Repeated Violations of Wage Laws, 2007-2012			
Company	**Civil Penalty**	**Reason**	**Federal Contracts 2012**
Sprint Nextel Corp	$222,860	Repeated	$131.9 million
UnitedHealth Group, Inc.	$104,280	Repeated	$276.5 million
Marriott International, Inc.	$69,540	H2B Visa Violations	$7.8 million
C&S Wholesale Grocers, Inc. (Piggly Wiggly)[32]	$68,970	Child Labor Violations	$1.7 million
C&S Wholesale Grocers, Inc.	$65,340	Repeated	$1.7 million
Acosta, Inc.	$58,960	Repeated	$44.6 million
University of Pittsburgh Medical Center	$50,435	Repeated	$8.0 million
Total	**$640,385**		**$470.5 million**

While the number of federal contractors among the top recipients of civil penalties is considerably lower than the number of contractors among the recipients of the largest back pay awards, it is cause for concern that even among companies that are repeat or willful violators of wage laws, there is no evidence that their record of federal wage law violations is being considered during the contracting process.

Federal Contractors with Multiple Labor Law Violations

While a review of the largest penalties and assessments persuasively demonstrates that federal contractors are among the largest scale federal labor law violators, it nonetheless provides an incomplete picture of the scope of enforcement actions taken against the various companies. Because the Department of Labor does not currently track enforcement actions across parent companies and their subsidiaries, and because the Department does not integrate or aggregate the enforcement data collected by any of the agencies within the Department, such as OSHA and the Wage and Hour Division (WHD) enforcement actions, it is difficult to analyze the number of times that any single entity, at the parent company level, has been the subject of an enforcement action pertaining to federal labor law.

However, of the 49 federal contractors responsible for the largest wage or health and safety assessments or penalties, 35 were cited for failure to comply with *both* federal wage laws and federal health and safety laws. When all WHD back wage assessments and OSHA initial penalties by a company and its affiliates and subsidiaries are analyzed, the 35 companies amassed a staggering 1,598 separate OSHA penalties or WHD back pay awards in just six years:

[32] Each Piggly Wiggly is independently owned and operated.

Table E: 35 Federal Contractors with Violations of Both Wage and Safety Laws, 2007-2012					
Company	Number of Violations			Total Penalties and Assessments	Federal Contracts in 2012
	WHD	OSHA	Total		
Home Depot	7	241	248	$2,606,861	$1.0 million
Tyson	1	161	162	$7,195,014	$555.5 million
AT&T	10	122	132	$5,667,174	$620.6 million
JBS	10	84	94	$2,352,144	$59.9 million
Nestle	22	68	90	$6,853,295	$231.7 million
General Dynamics	6	79	85	$4,849,075	$14,557.1 million
Americold	1	73	74	$1,876,807	$8.1 million
Reynolds Group	5	57	62	$1,553,253	$37.2 million
Cintas	2	59	61	$3,393,370	$3.4 million
General Motors	4	51	55	$3,066,978	$393.8 million
C&S Wholesale Grocers	3	43	46	$1,303,131	$1.7 million
G4S	31	13	44	$3,377,008	$551.6 million
Manpower	9	29	38	$5,166,441	$3.8 million
URS	10	28	38	$6,313,710	$4,138.2 million
Lockheed Martin	20	18	38	$3,229,543	$35,812.7 million
Kinder Morgan	13	24	37	$1,154,295	$3.8 million
Chrysler Group	1	36	37	$1,543,714	$191,159 million
Danaher	2	33	35	$1,614,701	$141.3 million
Tesoro Corporation	2	24	26	$2,775,730	$463.0 million
Ball Corp	1	23	24	$1,116,083	$336.3 million
Daikin Industries	1	22	23	$1,446,985	$1.7 million
L-3 Communications	11	11	22	$1,499,992	$6,970.7 million
Computer Sciences Corp	8	12	20	$2,057,436	$3,862.0 million
Management and Training Corp	10	5	15	$21,538,030	$347.8 million
CGI	4	9	13	$1,708,397	$562.8 million
Serco	7	5	12	$1,807,281	$573.1 million
Hewlett-Packard	5	6	11	$5,851,070	$2,814.4 million
Huntington Ingalls	1	9	10	$924,458	$4,115.1 million
CVR Energy	1	9	10	$2,615,987	$243.5 million

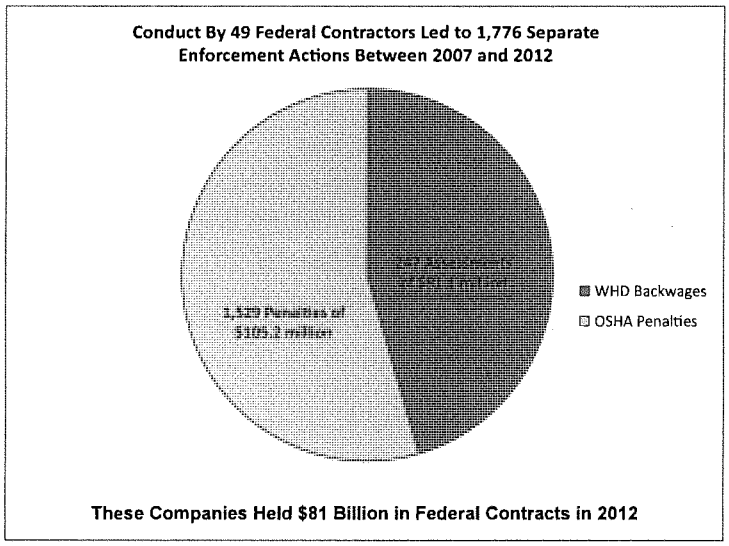
Table E: 35 Federal Contractors with Violations of Both Wage and Safety Laws, 2007-2012					
Company	Number of Violations			Total Penalties and Assessments	Federal Contracts in 2012
	WHD	OSHA	Total		
Warburg Pincus	6	3	9	$1,240,760	$4.1 million
UnitedHealth Group	8	1	9	$1,029,514	$276.5 million
Cerberus Capital Management	5	2	7	$1,863,607	$365.7 million
Husky Energy	1	4	5	$4,102,807	$109.8 million
Vanderbilt University	2	2	4	$867,846	$30.8 million
Olympus Corp	1	1	2	$975,194	$71.3 million
Total	**231**	**1367**	**1598**	**$116,538,199**	**$78,018.6 million**

Over 79,000 workers were awarded back wages as a result of these 231 violations, including more than 12,000 workers employed by Nestlé and its subsidiaries, more than 7,700 employees of Manpower Inc., and more than 4,000 employees of Warburg Pincus owned Rural/Metro Corporation. Three federal contractors were assessed penalties or back wages over 100 times in the six years, including 248 separate violations by Home Depot. In total, $78 billion in federal contracts were held in 2012 by the 35 companies that have collectively been penalized for 1,598 separate incidents of noncompliance with federal labor law in just six years.

When franchises and dealerships are factored in, a pattern of thousands of additional violations can be seen.

Table F: Wage and Safety Violations by Franchises and Dealers of Federal Contractors, 2007-2012					
Federal Contractor	Number of Violations			Total Penalties	Parent Company Federal Contracts 2012
	WHD	OSHA	Total		
BP Franchises	125	8	133	$1,362,498	$1,962.1 million
Tesoro Corporation	14	7	21	$75,535	$463.0 million
General Motors Dealers	80	228	308	$1,523,370	$30.4 million
Chrysler Group Dealers	53	96	149	$778,576	$1.3 million
Total	**411**	**390**	**801**	**$4,533,510**	**$3,010.1 million**

Overall, the 49 federal contractors responsible for large violations of federal labor laws were cited for 1,776 separate violations of these laws and paid $196 million in penalties and assessments. In fiscal year 2012, these same companies were awarded $81 billion in taxpayer dollars.



It is deeply concerning that companies with such a pattern of noncompliance with multiple federal labor laws are nevertheless recipients of such a significant amount of federal contracts and taxpayer dollars. As the above findings demonstrate, too often, federal contractors are both repeated and significant violators of federal labor law, as measured by the size, frequency, and severity with which they appear in the Department of Labor's enforcement database. The actual labor records of these companies suggest that a clear system needs to be put in place to evaluate how non-compliance with federal labor laws should factor into the requirement that the federal government only contract with firms that can demonstrate a satisfactory record of integrity and business ethics.

Violations Beyond Labor Law

While the violations detailed above all concern federal labor law, in some instances, contractors receiving the largest labor law assessments and penalties have committed multiple other violations of federal law without facing any limitations on the ability to receive federal contracts. Looking beyond labor law violations further reveals systemic breakdowns in the responsibility determination process. Indeed, it is not only violations of federal labor laws that are not being considered by contracting officers seeking to determine whether or not a prospective contractor has a satisfactory record of compliance with federal law.

As one example, United Kingdom-based G4S (formerly known as Group 4 Securicor) and its U.S. subsidiary G4S Secure Solutions (formerly Wackenhut) received $523.1 million in federal contracts in fiscal year 2012, primarily for providing security guards and security systems to the Departments of Energy, Defense, Homeland Security, and State. Yet as detailed above, in 2007, a $2.5 million award for

back pay was assessed against Wackenhut after the Department of Labor determined that 280 current and former fire and security contract workers at the Holston Army Ammunition Plant in Kingsport, Tennessee, were not paid required compensation under the Service Contract Act.[33] During this same time period, G4S and its other subsidiaries were responsible for a total of 13 additional OSHA violations and 31 additional WHD back pay assessments for a total of $3.4 million in penalties.

But in addition to these violations, according the Project on Government Oversight, G4S is responsible for 21 separate instances of misconduct for a total dollar amount of $23.5 million over a 22-year period.[34]

These include a 2010 consent decree between Wackenhut and the Department of Labor's Office of Federal Contract Compliance Programs to resolve allegations that the company had engaged in racially discriminatory hiring practices. The consent decree required the company to provide $290,000 in back pay and interest on behalf to 446 African-Americans who had been rejected from positions as security officers at the company's Aurora, Colorado facility.[35] In 2010, Wackenhut additionally agreed to pay the $650,000 to resolve False Claims Act allegations that the company had submitted hundreds of thousands of dollars in unallowable expenses (including a charter boat cruise and a Polynesian drum show) to the Department of Energy in connection with security services at the Savannah River Site and other facilities.[36] Additionally, in 2010, Wackenhut settled a False Claims Act case with Miami-Dade County, after an audit found that Wackenhut billed Miami-Dade Transit over $6 million for work that its security guards did not perform.[37] In 2009, Wackenhut owned ArmorGroup North America (AGNA) paid $7.5 million to resolve allegations that a former employee was fired after exposing deficiencies and illegalities relating to AGNA's contracts to provide security at the U.S. Embassy in Kabul, Afghanistan, and at the U.S. Naval base in Bahrain.[38] Allegations included that AGNA personnel visited brothels in Kabul with the knowledge of management, and the company misrepresented the prior work experience of Embassy security guards.[39]

Yet although G4S received more than $500 million in taxpayer dollars in fiscal 2012 alone, the primary database that is the main resource for contracting officers making a determination based upon misconduct has no record of any of these incidents.

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[33] However, because SCA wage determinations had not been interested in the contract, at the time of the decision it was disputed as to who would be responsible for paying the back pay award. The Army stated the back pay award would ultimately be Wackenhut's responsibility, while Wackenhut claimed that federal procurement regulation allowed it to bill the Army for the back pay.

[34] G4S announced its intent to sell G4S Secure Solutions (USA) in March 2013 but appears to still currently own the former Wackenhut.

[35] PROJECT ON GOVERNMENT OVERSIGHT, *Federal Contractor Misconduct Database*, http://www.contractormisconduct.org/.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] A September 2010 report by the State Department Office of Inspector General further documented numerous problems with the agency's contract with ArmorGroup. The deficiencies identified by the OIG include ArmorGroup hiring guards without verifiable experience, training, or background checks, not being able to account for 101 government-furnished weapons that had been missing since 2007, and allowing individuals who were not properly screened to have unescorted access to government facilities containing sensitive materials.

The Causes: Poor Data, Lack of Effective Information-Sharing, Inadequate Expertise, and Inflexible Penalties

Given the scale of the findings above, it is clear that violations of labor laws are not being adequately considered or analyzed in the contractor responsibility determination process. Even though the above analysis is based almost exclusively on publicly available data, it is information that unfortunately is virtually never available to the contracting officer in a form that would allow that official to use the information to make a determination of whether a company is in fact a responsible actor.

A more detailed understanding of the weaknesses of the existing contract process is necessary to understand why this is the case, and to begin assessing steps that can be taken to better ensure that companies seeking government contracts have safe and fair working conditions.

Contracting Officers Lack Accurate Data

Databases

In order to determine the responsibility of a prospective contractor, contracting officers primarily utilize three databases housed at the General Services Administration. The Excluded Parties List System (EPLS) is used to inform contracting officers whether or not a prospective contractor has been suspended or debarred and is therefore ineligible to receive a contract. The Past Performance Information Retrieval System (PPIRS) contains information on the past performance of a contractor, including a written narrative describing the contractor's performance on a specific contract. Finally, in 2008, the Clean Contracting Act led to the creation of the Federal Awardee Performance & Integrity Information System (FAPIIS), which is intended to help a contracting officer determine whether or not a bidder has any civil, criminal, or administrative proceedings involving federal contracts that resulted in a conviction or finding of fault in the last five years.[40] Contracting officers may consider additional information, but they are not affirmatively required to do so. Thus, as a practical matter, if information is not included in one of the three primary databases available to contracting officers, it is generally not evaluated as part of the responsibility determination process.

Unfortunately, common flaws and limitations in the three data systems significantly weaken the responsibility determination process, and specifically inhibit the ability of contracting officers to accurately evaluating a prospective contractor's compliance with federal labor law prior to awarding a contract.

For example, in 2005, data in EPLS was found insufficient to enable agencies to determine if a potential contractor was excluded.[41] Despite subsequent modifications, excluded firms continue to receive contracts due to "ineffective management of the EPLS database or to control weaknesses at both excluding and

[40] In addition, FAPIIS also requires government agencies to report non-responsibility determinations, contract terminations for default or cause, agency defective pricing determinations, and administrative agreements entered into following a resolution of a suspension or debarment.

[41] U.S. GOV. ACCOUNTABILITY OFFICE, FEDERAL PROCUREMENT: ADDITIONAL DATA REPORTING COULD IMPROVE THE SUSPENSION AND DEBARMENT PROCESS (2005).

procuring agencies."[42] Excluded businesses that have continued to receive federal contracts include a company that was debarred after attempting to ship nuclear bomb making materials to North Korea, yet subsequently received over $4 million from the Army.[43] A second company was debarred after pleading guilty to attempting to defraud the Department of Defense through falsified cost claims and money laundering, but was subsequently awarded $230,000 because the contracting officer used an incorrect business name to search EPLS.[44] Specifically, GAO recently found that incorrectly punctuated or spelled company names, missing unique identifying numbers, or changes to business names leave holes in the EPLS data, which hinder a contracting officer's ability to determine the eligibility of prospective contractors.

The FAPIIS database suffers not only from the types of problems that plague EPLS, but also from statutory and regulatory limitations that prevent it from accomplishing its intended goal. As a result of these limitations, only one of the 49 contractors that appear in the tables above has entered any instances of misconduct in FAPIIS and it is unclear what violation (or violations) that company, Lockheed Martin, is referring to in the FAPIIS entry.[45]

As an initial matter, the information that is required to appear in FAPIIS pertaining to whether or not a contractor has, in the previous five years, been the subject of any criminal, civil, and/or administrative proceeding at the federal or state level in connection with a federal award that resulted in a conviction or finding of fault or liability, is self-reported by individual federal contractors and is not currently subject to any type of audit. Further, contractors are only required to submit information to FAPIIS about violations of the law if that violation occurred in the performance of a state or federal contract, and only when the conduct resulted in a formal finding of fault. So, as an example, while G4S and its subsidiaries have a lengthy history of lawsuits, including multiple instances of fraud in the performance of a contract as described above, G4S has no misconduct entries in FAPIIS.[46] Because many of the suits filed against G4S and its subsidiaries led to settlements, it is possible the company has determined they are not required to include these incidents in FAPIIS. Additionally, reporting is only required for companies with more than $10 million in total federal contracts, *and* only when the violation of law occurs on an individual contract worth more than $500,000. Teltara, one of the companies debarred during the period for a violation of the Service Contract Act, is one of 13 companies that fail to meet the $10 million FAPIIS contract threshold and has no misconduct listed in FAPIIS. Home Depot, which was cited for 7 violations of wage and hour laws and 241 separate violations of safety and health laws between 2007 and

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[42] U.S. GOV. ACCOUNTABILITY OFFICE, EXCLUDED PARTIES LIST SYSTEM: SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS 4 (2009).

[43] *Id.*

[44] *Id.*

[45] The affirmative entry in FAPPIS appears as follows: Question: Within the last five years, has your business or organization (represented by the DUNS number on this specific Entity Management section of SAM record) and/or any of its principals, in connection with the award to or performance by your business or organization of a Federal contract or grant, been the subject of a Federal or State (1) criminal proceeding resulting in a conviction or other acknowledgment of fault; (2) civil proceeding resulting in a finding of fault with a monetary fine, penalty, reimbursement, restitution, and/or damages greater than $5,000, or other acknowledgment of fault; and/or (3) administrative proceeding resulting in a finding of fault with either a monetary fine or penalty greater than $5,000 or reimbursement, restitution, or damages greater than $100,000, or other acknowledgment of fault?
***Contractor Response: **Yes**

[46] G4S appears to have as many as 86 potential different entities each with their own unique DUNS number. None of these entities appear in FAPIIS in either the government entered data or the vendor reported data.

2012 – more than any other firm named in this report -- received only $1 million in contracts and therefore has no entry in FAPIIS.[47] Finally, reporting is only required for violations that occurred in the past five years.[48]

In perhaps the most astonishing example of the failures of FAPIIS, BP, despite the deaths, injuries, and massive environmental damage, as well as the billion dollar settlements resulting from the Deep Water Horizon incident, and despite the deaths, injuries and fines resulting from the Texas City refinery explosion, and despite holding $2 billion in contracts in 2012, has no misconduct entries in FAPIIS.

While contractors are expected to enter qualifying misconduct decisions into FAPIIS, agencies also have authority to enter additional information into FAPIIS although this appears to be largely limited to information pertaining to performance on a contract, not to violations of the law. Thus, none of the companies above, including those with repeat and willful violations appear to have any FAPIIS misconduct entries.[49] The result is that contracting officers have no easy access to publicly available information on failure to comply with labor laws.

Contracting officers do not generally seek information outside of FAPIIS and the other databases in evaluating a prospective contractor's compliance with federal law. For that reason, the limitations of FAPIIS, along with the failure of contractors to report violations, means that a significant amount of information about a prospective contractor's record of compliance with the law is not considered by contracting officers when making responsibility determinations. As a result, FAPIIS does not provide contracting officers with even a minimal picture of a prospective contractor's record of compliance with federal law, and in particular federal labor law. Consequently, the one database that it supposed to provide contracting officers with a limited look at whether or not a prospective contractor has a sufficient record of integrity is not accomplishing its intended purpose.

Data Deficiencies

Moreover, none of the contracting databases appear to track information in a way that accurately reflects the conduct of the corporate entity as a whole, including conduct by parent and subsidiary companies. This failure leaves contracting officers without a complete record of a prospective contractor's integrity and business ethics. Federal contractors in all three systems, EPLS, PPIRS, and FAPIIS, are tracked primarily by the Dun and Bradstreet Data Universal Number System (DUNS). However, many corporate entities have multiple DUNS numbers that are used by subsidiaries and affiliates controlled by the same parent company. For example, according to the Project on Government Oversight, Lockheed Martin has over 200 DUNS numbers among its corporate affiliates.[50] Because the DUNS system fails to provide

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[47] For a good discussion of the shortcomings of FAPIIS, *see* Letter from David Madland, Director, American Worker Project, Center for American Progress Action Fund to Hada Flowers, General Services Administration (Nov. 4, 2009) (available at http://www.americanprogressaction.org/wp-content/uploads/issues/2009/11/pdf/ndaa_letter.pdf).

[48] *Id.*

[49] Kinder Morgan (administrative agreement), United Health Care (termination for cause), Cintas (termination for cause).

[50] Neil Gordon, *POGO Suggests Way to Improve Federal Contractor Accountability Database,* PROJECT ON GOVERNMENT OVERSIGHT, (2012), http://www.pogo.org/our-work/letters/2012/20120917-pogo-suggests-way-to-improve-federal-contractor-accountability.html.

contracting officers with a way to understand an entity's corporate structure, the full scope of misconduct is not immediately ascertainable.

As the analysis above demonstrates, when violations by parent companies, subsidiaries and affiliates are assessed and attributed up the corporate hierarchy to a single parent company, a dramatically different picture of noncompliance emerges. This is significant because even though suspensions or debarments may be applied across multiple parts of a corporate entity, the current system appears to lack the ability to accurately assess repeated violations by a parent company and subsidiaries when multiple subsidiaries hold significant contracts. Both the GAO and the Project on Government Oversight have highlighted how this inability has led to the government contracting with companies that should have been excluded from receiving contracts.[51]

Department of Labor

Even if all of the deficiencies in FAPIIS were addressed, it would still be extremely difficult to ensure that a contracting officer could fully consider a prospective contractor's record of compliance with federal labor law because of deficiencies in the publicly available enforcement data published by the Department of Labor. Resource constraints and human error at the Department of Labor result in substantial errors in the databases that track violations of occupational safety and health laws and wage and hour laws. As a result, without improvement, these databases cannot be effectively consulted by contracting officers, either independently or through FAPIIS.

The principal issue with these databases is that they fail to accurately identify the name of the company responsible for the violation. Neither WHD nor OSHA enforcement data include any unique identifiers, such as a DUNS number, or any information regarding whether or not the company is an affiliate, subsidiary, or parent company. Complicating matters further, firms appear under multiple names in both the OSHA and WHD data. For example, Pilgrim's Pride Corporation, a subsidiary of Brazilian company JBS S.A., appears in the OSHA database under at least eight different names.[52] Similarly, Manpower Group is listed in at least thirteen different forms in the WHD data.[53]

It is unlikely that the Department of Labor could make needed improvements to the existing data in the absence of additional resources. Yet, without improvements, even if these datasets were consulted as part of a pre-award responsibility determination, the data would prove of little use to the contracting officer. Without unique identification information that provides the ability to compare violations entity by entity,

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[51] *See*: Neil Gordon, *POGO Suggests Way to Improve Federal Contractor Accountability Database,* PROJECT ON GOVERNMENT OVERSIGHT, (2012), http://www.pogo.org/our-work/letters/2012/20120917-pogo-suggests-way-to-improve-federal-contractor-accountability.html; William Woods, *Government is Analyzing Alternatives for Contractor Identification Numbers,* U.S. GOV. ACCOUNTABILITY OFFICE (2012), http://www.gao.gov/assets/600/591551.pdf; U.S. GOV. ACCOUNTABILITY OFFICE, EXCLUDED PARTIES LIST SYSTEM: SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS 4 (2009).

[52] Pilgrim's Pride; Pilgrim Foods Co.; Pilgrim's Corporation; Pilgrim Pride; Pilgrim's Pride; Pilgrim's Pride Corp.; Pilgrim's Pride Corp; Pilgrim's Pride Corporation.

[53] Manpower; Manpower Inc.; Manpower International, Inc.; Manpower International, Inc.; Manpower Now; Manpower of Kent County, Inc.; Manpower of Lansing, MI, Inc.; Manpower, Inc.; Manpower Manpower/Magna Donnelly; Manpower Temporary Services/Interbake Foods; Cablevision/ Manpower; Manpower Temporary Services of New Mexico; Manpower West Tennessee;

or aggregate violations among corporate affiliates, it is very difficult to determine the extent to which a prospective contractor has a record of compliance with federal labor laws. Similarly, the failure to even properly enter the names of the firms in the system adds complexity and makes it likely that a contracting officer could miss an important piece of information when undertaking a responsibility determination.[54]

Additionally, many labor law violations can take a lengthy period of time to bring to conclusion including appeals and negotiations, and as a result the Department's database does not provide contracting officers with the most current information regarding a prospective contractor's compliance with law.

Similarly, violations of labor law on state or local contracts, for example G4S' settlement of allegations that the company billed Miami Dade transit $6 million for work not performed, are not currently tracked or available to contracting officers or the Department of Labor. To the extent that allegations of state-based labor violations are settled in private litigation, neither the contracting databases nor the Department of Labor have any record of the misconduct, although such information could nevertheless help inform a contracting officer as to whether or not a prospective contractor is a responsible actor.

Although the Department of Labor is the entity most able to accurately identify, aggregate, and compare violations of labor laws, the current data systems lack of unique identifiers and human error in inputting information into the databases can result in the same firm appearing under multiple names, making it very difficult to provide a full and accurate picture of labor law violations by federal contractors. In the absence of a uniform database system that clearly identifies corporate entities and subsidiaries that are investigated and penalized for any type of violation of federal labor laws, it is difficult to determine which federal contractors are responsible for large labor law violations. Moreover, additional information regarding potential violations of labor law from state governments, workers, worker representatives, or employers is not currently being tracked or collected by any government entity.

Contracting Officers Lack the Tools to Evaluate Violations of Labor Law

Critically, even if data concerning labor law violations does come to the attention of a contracting officer – from either Department of Labor databases or other sources – the contracting officers, most of whom lack expertise in labor law, face serious challenges in how to evaluate that information. For instance, what does it mean if a company has multiple violations? How large are the largest penalties? Are the violations repeated or willful? Does the firm appear in both the OSHA and WHD enforcement data but only for very small violations? These questions are both essential for a contracting officer to consider in making a pre-award responsibility determination but are outside of his or her expertise without additional criteria or guidance.

The Federal Acquisition Regulations (FAR), the regulations that dictate how contracting officers are to make responsibility determinations, fails to provide contracting officers with adequate guidance as to how to answer these questions. As was stated clearly in 2000 by the Federal Acquisition Regulatory Council:

> "the FAR has not elaborated upon what it means to have 'a satisfactory record of integrity and business ethics' nor has the FAR provided contracting officers with a framework to

[54] For example, one of the 100 largest back wage assessments was against Cerberus Capital Management owned "IAP Worldwide Services." However, the company appears in the WHD enforcement data as "I.A.P. World Services, Inc." meaning that a search for "IAP" would have missed this enforcement action.

> guide their analysis and assist them in making this statutorily required determination. This lack of guidance has an unfortunate consequence: Contracting officers are extremely reluctant, absent clear guidance, to exercise their discretion in making responsibility determinations."[55]

Even presented with the information contained in this report, a contracting officer would be hard pressed to determine if the conduct of a specific company was sufficiently egregious to warrant suspension or debarment in the absence of additional guidance and factual information.

In this respect, little has changed since 2000. Contracting officers still lack clear standards that would allow them to interpret the meaning of violations of federal labor law, and therefore do not undertake a formal or standardized process in evaluating a prospective contractor's compliance with federal labor law prior to awarding a contract.

The Debarment Process is Ineffective:

While it may not be the case that the misconduct identified in this report should result in each of the contractors identified becoming ineligible for federal contracts, it is clear that the current system fails to adequately promote compliance with federal law or provide opportunities for companies to demonstrate improvement upon past practices. Indeed, the fact that only one of the 49 companies that received the largest penalties and back wage assessments, BP, has been suspended – for issues unrelated to the company's treatment of its workers – indicates that that these tools are not widely used to ensure that the federal government enters into contracts with companies that have a proven record of compliance with federal labor laws.

As previously discussed, in order to best protect the public, agency officials have discretion to debar or suspend contractors under a number of circumstances, including when a contractor is convicted of or found civilly liable for a lack of business integrity or for "any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor."[56] These provisions of the Federal Acquisition Regulation provide the Department of Labor with authority to suspend or debar a federal contractor that has a record of non-compliance with federal labor law if the Department were to find that this record of non-compliance was so severe as to demonstrate a lack of business integrity that would impact the present responsibility of the contractor. However, while the Department suspends and debars companies using the statutory authority provided by the Service Contract Act and the Davis-Bacon Act, the Department does not appear to have debarred a company as a result of OSHA or other wage-related violations, or attempted to cross reference repeat or willful violators of multiple laws.

Additionally, the suspension and debarment process suffers from a number of more widespread problems, including the lack of standardization across the government. Agencies structure and perform their exclusion functions in very different ways, and this affects the degree to which agencies exclude contractors. Moreover, even when a contractor is debarred or suspended, agencies are authorized to waive a contractor's exclusion if they determine "there is a compelling reason for such an action." Some agencies have regulations that define what constitutes a "compelling reason" while others do not. Further, these waivers are agency-specific and are not always communicated to other agencies.

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[55] Federal Acquisition Regulation, 5 Fed. Reg. 80256 (Dec. 20, 2000).
[56] 48 CFR § 9.406-2.

Ensuring that federal contractors operate safe and fair workplaces in order to be eligible to contract with the government requires that labor law violations by federal contractors be taken into account during the contracting process. Unfortunately, the existing suspension and debarment process is underutilized and inconsistent. At the same time, the debarment process tends to focus directly on conduct related to a specific contract rather than on the overall labor practices of federal contractors. If Federal agencies are given more tools and encouraged to look to solutions short of debarment or suspension, they could more effectively deter companies that fail to comply with federal labor laws from future violations.

Conclusion and Recommendations

It is imperative that violations of federal labor laws be taken seriously and have real repercussions for companies that fail to provide basic workplace protections, including paying fair wages and providing safe workplaces. Yet under the current system, almost 30 percent of the most egregious recent violations of federal wage and hour and safety and health laws -- including violations that have led to death and serious injury -- were committed by companies that were simultaneously receiving lucrative federal contracts paid for by taxpayer dollars. As the findings of this investigation make clear, despite existing requirements that taxpayer dollars only be awarded to responsible contractors that comply with federal law, the contracting process fails to provide a mechanism to consider this information, and at minimum ensure that companies that violate federal labor laws face additional scrutiny.

The most effective way to address this problem is to improve the process for making the determination whether a particular company is a responsible contractor. To accomplish this objective, a workable system must be established that allows contracting officers to fully consider a prospective contractor's compliance with federal labor laws.

First, contracting officers must be able to easily *access* data regarding violations of federal labor law by a corporate entity, including a parent company and all subsidiaries, regardless of whether the violation occurred in performance of a contract. This requires improvements to data systems at the Department of Labor and the General Services Administration, including improvements to data systems so that contracting officers can better understand the relationships between corporate entities. Second, contracting officers need a mechanism for *evaluating* data regarding the seriousness of specific labor law violations so that this information can be properly considered in a responsibility determination. The Department of Labor can assist in providing contracting officers with this type of guidance. Finally, federal agencies need to be given tools less severe than debarment or suspension to more effectively protect taxpayer dollars from supporting companies that lack responsible compliance with labor laws. The current system -- which provides that the primary remedy for violation of federal law is the remote chance of losing eligibility for all future contracts – provides only a blunt and rarely-utilized tool that fails to protect taxpayer dollars or properly leverage the promise of federal government dollars to ensure that recipients provide workplaces that operate in accordance with the law.

Recommendations

Recommendation #1: The Department of Labor should take steps to improve the quality and transparency of information on workplace safety violations:

As a primary matter, contracting officers need access to accurate data in order to determine whether or not a prospective contractor has a record of compliance with federal labor law. The Department of Labor's enforcement databases were not designed to be used by contracting officers to assist with responsibility determinations, and they suffer from previously described shortcomings, including the failure to provide a standard unique identifier, such as a DUNS number, to corporate entities and subsidiaries that are cited and assessed penalties for violations of federal labor laws. In addition, the databases fail to accurately identify the company that was the subject of the enforcement action. Combined, the lack of unique identifiers and human error in inputting information into the databases result in the same firm appearing

under multiple names, making it very difficult to accurately identify, aggregate, and compare violations in these databases.

While the Department of Labor already makes available a large amount of enforcement data, and has taken recent steps to identity severe violators of health and safety standards, to better inform the public and contracting officials, the Department of Labor should take immediate steps to improve the quality of its data. To provide this information in a clear and transparent manner, the Department needs to develop a uniform database system that clearly identifies corporate entities and subsidiaries that are investigated and penalized for any type of violation of federal labor laws, and doing so may require additional resources. The Department should at a minimum take steps to correct errors in the existing data that make it difficult to identify the precise entity listed in the database.

Recommendation #2: The Department of Labor should annually publish a list of contractors that violate federal labor law:

In addition, the Department should annually prepare and make public a list of the top penalties assessed for each type of labor law violation. The information provided should include the type and amount of the penalty, the number of employees affected, the number of deaths or serious injuries that resulted from the violation, and a short description of the conduct leading to the penalty. Such a list should also indicate whether the corporate entity or a parent company is a federal contractor, the amount of federal contract dollars received in the current fiscal year, and whether the company had previously been penalized. Such a list should be included in all contracting databases and also made publicly available.

Recommendation #3: The Government Services Administration should improve contracting databases by increasing public transparency and expanding the amount of information included in the databases:

Although the purpose of the Federal Awardee Performance Integrity & Information System (FAPIIS) is to provide contracting officers with a database of information to evaluate a prospective contractor's compliance with federal law during the pre-award responsibility determination process, it is failing to serve this function. FAPIIS is currently the only source that a contracting officer would consult in seeking to determine compliance with federal law during a responsibility determination, but includes almost no information that would help a contracting officer determine whether or not a prospective contractor has a record of compliance with labor laws.[57]

While the Clean Contracting Act places some limits on the type of information that can be put into FAPIIS, the Act also authorizes the GSA to include such "other information" as is necessary to carry out the purpose of the Act.[58] Therefore, the Federal Acquisition Regulations should be amended to expand and improve FAPIIS in the following ways, to guarantee the system provides contracting officers with a complete record of a prospective contractor's compliance with labor law:

- FAPIIS should be expanded to cover violations of federal labor law even if those violations did not take place in the performance of a federal contract. Without this change, FAPIIS will continue to unnecessarily limit the ability of contracting officers to gain a complete understanding of a prospective contractor's compliance with labor law.

[57] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008).
[58] 41 U.S.C.A. § 2313.

- Although the Clean Contracting Act only requires FAPIIS to include incidents that took place in the previous five years, it should be expanded to include violations of labor law that occurred over a longer period.

- Finally, FAPIIS should be expanded to include incidents in which reimbursements, restitutions, or damages were under $100,000, as many instances of significant labor law violations result in restitution under this $100,000 threshold.

Recommendation #4: The President should issue an Executive Order to allow the Department of Labor to input additional information into FAPIIS concerning contractor compliance with labor law:

While the previously mentioned reforms to FAPIIS would help to ensure that the system fully includes a prospective contractor's compliance with federal labor law, there are a number of other sources of information that can assist a contracting officer in determining whether or not a prospective contractor has a record of paying its workers fairly and providing those employees with safe working conditions. For instance, many violations of labor law are enforced at the state level, and that information is currently missing from FAPIIS. In addition, because of the time that it can take the Department of Labor to conclude a case and enter it into its enforcement database, FAPIIS may not fully account for all violations of federal labor law that could be relevant to a responsibility determination.

For these reasons, the President should issue an Executive Order to allow disinterested officials at the Department of Labor to enter additional information into FAPIIS that could be pertinent for contracting officers to consider during the responsibility determination process, rather than relying on federal contractors to self-report. The Executive Order should allow outside parties to present evidence to the Department about potential violations of labor law. For instance, state governments could provide the Department with information pertaining to violations of state and local labor laws, while workers, worker representatives, or employers could also present evidence to the Department. In addition, to ensure that FAPIIS includes the most current information possible about the most serious types of violations, the Executive Order should allow the Department to input information once a civil monetary penalty has been assessed by the Wage and Hour Division, or once a citation for a serious, willful, repeated, or failure-to-abate violation has been issued by the Occupational Safety and Health Administration.

Recommendation #5: The President should issue an Executive Order to strengthen the responsibility determination process by establishing clear guidelines for contracting officers to use in determining a prospective contractor's record of integrity and business ethics:

Once contracting officers are made aware of a prospective contractor's record of compliance with federal labor law, those officials need to be able to understand the meaning of that company's record in this area. As contracting officers are not experts in federal labor law, they need clear guidance to aid in their understanding of a prospective contractor's compliance with labor laws. Unfortunately, the Federal Acquisition Regulations fail to provide contracting officers with adequate guidance as to what constitutes a satisfactory record of integrity and business ethics in this regard.

To remedy these shortcomings, the President should issue an Executive Order requiring contracting officers to consult with, and obtain recommendations from, a designated official at the Department of Labor about violations of federal labor law when making responsibility determinations.

Recommendation #6: The President should issue an Executive Order to better safeguard taxpayer dollars by establishing a mechanism that encourages federal contractors to comply with federal labor law beyond the existing responsibility determination and suspension and debarment process:

Currently, contracting agencies do not generally seek to address labor violations with requirements short of suspension and/or debarment. The suspension and debarment process is taken very seriously and each agency has its own official in charge of suspension and debarment procedures. But, it is generally reserved for the most severe circumstances, as once a contractor is suspended or debarred they are ineligible to receive a contract from any federal entity.

For that reason, the President should issue and Executive Order that creates a clear process through which agencies can – in consultation with the Department of Labor – put in place additional requirements to ensure contractors comply with federal labor law in order to continue doing business with the government. For example, the continuation or renewal of a contract could be made contingent upon taking defined steps – including, but not limited to, changing pay practices or safety procedures, paying unpaid penalties or back pay awards, and/or agreeing to voluntary inspections – that are likely to improve the company's record of compliance with critical labor laws. As part of this Executive Order, the President should encourage agencies to carefully consider whether or not they could better promote compliance with federal law, and better safeguard taxpayer dollars, by having federal employees perform the work in question.

Recommendation #7: The Department of Labor should more fully consider a company's complete record of compliance with labor law, including that of its subsidiaries and affiliated entities, when ascertaining whether or not a company is presently responsible to receive federal contracts:

As previously detailed, agencies retain the ability to suspend or debar a company if the agency finds that the company has committed certain integrity offenses that impact the present responsibility of the company. However, there is no evidence that the Department of Labor has ever fully considered a company's complete record of compliance or non-compliance with all of the laws that it enforces when determining the responsibility of a prospective contractor. To better protect taxpayer dollars, the Department of Labor should more fully consider whether or not a company with a substantial record of non-compliance with federal labor law should be eligible to receive federal contracts.

While the recommendations in this report are not unique to federal labor law and could perhaps be applied to other types of violations of law, given the increasing reliance of federal agencies on service contracts, it is imperative that contracting officers adequately consider prospective contractors' compliance with federal labor law prior to awarding a contract. When the government does solicit work from the private sector, it should use taxpayer dollars in a way that promotes compliance with federal law and improves the quality of life for working Americans. The American taxpayers, many of whom work as contractors or at firms that contract with the government, deserve nothing less.

Appendix I: Methodology and Sources

The following methodology was employed in order to develop the information contained in this report detailing the companies with large violations of federal labor laws that are also prime federal contractors.[59]

In order to determine companies with violations of federal labor laws, Committee staff consulted two enforcement databases maintained by the Department of Labor (DOL). The DOL's Wage and Hour Division (WHD) and Occupational Safety & Health Administration (OSHA) each maintain databases that list the enforcement actions taken by these divisions.

Both sets of enforcement data are publicly available via the Department of Labor's website. In both cases, information included in the data includes the name of the firm charged with the violation, and additional information about the size and severity of the violation, and the dates of action taken by the agency. The Committee staff accessed this data effective January 2013 for WHD and October 2013 for OSHA.

The six years of WHD compliance data primarily covers violations of the Fair Labor Standards Act (FLSA), the Service Contract Act, and Davis-Bacon and Related Acts. The Fair Labor Standards Act provides for a federal minimum wage, overtime pay, and child labor protections. Under Section 7 of the act, employers must pay covered workers at least one-and-a-half times their regular hourly wage for hours worked over 40 hours a week at a given job. While most wage and salary workers are covered by the FLSA, Section 13 of the Act exempts certain employers and employees from either the minimum wage or overtime standards of the Act, or both. The FLSA covers employees and enterprises engaged in interstate commerce.[60] The Service Contract Act applies to contracts entered into by the United States or the District of Columbia whose principal purpose is to furnish services to the United States through the use of service employees.[61] It requires contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of $2,500 to pay service employees no less than the monetary wage rates and fringe benefits found prevailing in the locality, or the rates contained in a preceding contractor's collective bargaining agreement.[62] Under the statute, violations of the Act can result in violators being debarred, but the Department of Labor retains discretion in enforcing the debarment

[59] For the purposes of this report, a company was considered a federal contractor if it was a prime federal contractor. Many of the companies listed in top 100 OSHA and WHD violations list could potentially be federal government subcontractors.

[60] Fair Labor Standards Act, 29 U.S.C. § § 201-219. An enterprise is covered if it has annual sales or business done of at least $500,000. Regardless of the dollar volume of business, the act applies to hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; federal, state, and local governments; and preschools, elementary and secondary schools, and institutions of higher education. Although enterprises that have less than $500,000 in annual sales or business done are not covered by the FLSA, employees of these enterprises may be covered if they are individually engaged in interstate commerce. These employees may travel to other states for work, make phone calls or send emails to persons in other states, or handle records that are involved in interstate transactions

[61] Service Contract Act, 41 U.S.C. § 351 *et seq.*

[62] *Id.*

provisions.[63] The Davis-Bacon Act, along with related Acts, provides similar prevailing wage requirements on certain types of federal construction projects.[64]

In the case of the WHD data, Committee staff searched all WHD compliance actions for cases in which the "findings end date" occurred between 1/1/2007 and 12/31/2012. The "findings end date" was used because the WHD database does not include a case closed date. As a result, there are instances identified in the report in which the conduct leading to the violation occurred began prior to 1/1/2007. However, in all cases identified, the conduct for which back wages were paid extended into the period between 1/1/2007 and 12/31/2012.

Cases with a "findings end date" during this six year window were then sorted by the amount of "back wages agreed to pay" in order to identify the 100 cases in which the largest amount of back wages were paid. (See Appendix 2). While only one Davis-Bacon Act violation is included in the report, companies that had violations relating to Davis-Bacon Act were identified among the top-100 largest back wage assessments but those companies were not federal contractors in fiscal year 2012.

Committee staff additionally sorted the 100 cases in which the largest amount of civil money penalties were assessed, which included six federal contractors and affiliates. Civil money penalties are typically assessed only in some cases of repeat and/or willful violations of FLSA's minimum wage or overtime requirements and for child labor violations, but overall those penalties were lower than the back wage assessments on which the majority of the analysis in the report is based. (Table D).

The Occupational Safety and Health Administration is the main federal agency charged with the enforcement of safety and health standards. The agency conducts inspections and assesses fines for regulatory violations of the health and safety standards.

Committee staff similarly searched all OSHA inspection cases in which there was a case closed date or an initial penalty determination made between 1/1/2007 and 12/31/2012. Committee staff aggregated publicly available data regarding individual OSHA inspection and citations to create a total amount of initial penalties assessed for each specific OSHA inspection in which there had been a citation. The case identification number associated with these violations was then matched to company identifying information contained in a separate part of the database.

Those cases were then sorted by the initial penalties assessed in order to identify the 100 cases in which the largest initial penalties were assessed. As noted in the report, initial penalties are frequently negotiated by employers with DOL, and can be reduced in an effort to reach resolution of a case and remediation of unsafe conditions in a timely matter. Because initial penalties more accurately reflect the severity of each particular incident, a determination was made to sort based on the initial penalty determination. However, for those companies listed in the report, the current penalty or an indication that the case remains open is also included. Open cases in which an initial penalty has been assessed are included in the analysis given that the investigation is complete, although the case may remain on appeal. Additionally, as employers are not required to abate potentially dangerous conditions until a case reaches its final disposition, limiting consideration to only cases that have been formally concluded would have

[63] *Id.*
[64] Davis-Bacon Act, 40 U.S.C. § § 3141-48.

potentially inappropriately excluded employers that have violated the law and have not yet remedied the unsafe condition.[65]

As with the WHD actions, this methodology may result in cases in which the misconduct occurred prior to 1/1/2007 being included. In addition, in at least three instances Committee staff found discrepancies between the information contained within the publicly available enforcement database and the Department of Labor's public releases regarding the enforcement action, which were more correct.[66]

Committee staff additionally reviewed companies included in OSHA's Severe Violator Enforcement Program (SVEP). This list includes any companies "who have demonstrated recalcitrance or indifference to their Occupational Safety and Health Act obligations by committing willful, repeated, or failure-to-abate violations in one or more of the following circumstances: (1) a fatality or catastrophe situation; (2) in industry operations or processes that expose employees to the most severe occupational hazards and those identified as "High-Emphasis Hazards," (3) exposing employees to hazards related to the potential release of a highly hazardous chemical; or (4) all egregious enforcement actions."[67] (Table B)

Parent companies of entities responsible for the 100 largest back wages assessments in the case of WHD, and the 100 largest initial penalty determinations in the case of OSHA, were then cross referenced with USA Spending in order to determine which of the companies identified as responsible for these actions held more than $500,000 in federal contracts in fiscal year 2012 (i.e. current significant federal contracts).[68] The list of the 100 top violators for both WHD and OSHA during the relevant period, including companies that did not appear in USA Spending, is included as Appendix 2.

USA Spending (www.usaspending.gov) is a public database that provides access to information about federal spending, including information about the amount, type, and recipient of federal dollars, including grants and contracts. As such, it represents the most comprehensive public data on the contracting activities of the federal government. The summaries section of USA Spending contains a listing of over 144,000 federal contractors, together with the amount of contracts awarded to the company in each fiscal year. Multi-year contracts are counted in the fiscal year awarded, although individual transactions on a contract are also tracked in USA Spending.

Overall, the analysis found that of the largest 100 WHD back pay awards, 35 were assessed against a company or subsidiary where the parent company also held more than $500,000 in federal contracts in fiscal year 2012. (See Table C.) Thirty-two separate companies were responsible for these 35 back wage assessments. In the case of OSHA, 23 large OSHA violations were assessed against 18 parent companies that also held more than $500,000 in federal contracts in fiscal year 2012. (See Table A.) In total, 49 separate companies are identified in the report as federal contractors that also received one of the largest WHD or OSHA violations. Basic summaries of the companies contained in the analysis, together with a brief summary of the violation leading to the penalty are available in Appendix 4.

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[65] In some cases companies can expend considerable resources in trying to fend off relatively modest OSHA penalties in order to avoid taking additional safety precautions. *See* Dave Jamieson, *Walmart Still Hasn't Paid Its $7,000 Fine For 2008 Black Friday Death* HUFFINGTON POST, (2013), http://www.huffingtonpost.com/2013/11/21/walmart-black-friday-death_n_4312210.html.

[66] See Appendix 4 for additional information.

[67] OSHA Instruction, Severe Violators Enforcement Program (SVEP), U.S. Dep't of Labor, Occupational Safety and Health Administration, https://www.osha.gov/dep/svep-directive.pdf.

[68] Public entities, including for example the Puerto Rico Police Department, were excluded from the analysis.

Both the WHD and OSHA databases pose considerable challenges from a research and analysis perspective. Company identifying information, including the corporate name, is often incorrect or listed inconsistently between cases. For example, the WHD data include separate entries for both the Trade Name and Legal Name of the company listed. In some cases, these entities are the same. In others, however, they differ in various ways. In some cases, a comma or apostrophe may be included in the Trade Name field but not the Legal Name field. In others, a company may be listed with the suffix "Co." in the Trade Name but the suffix "Inc." in the Legal Name. Finally, not infrequently, the named entities in the Trade Name field and Legal Name field appear to differ vastly. Unlike the WHD data, the OSHA data only includes one field, titled "Establishment Name," that can be used to identify the name of the entity.

For that reason, for cases in which the company that received the assessment or penalty appeared to be a federal contractor, additional efforts were undertaken to confirm the exact legal identity of the company. To do so, Committee staff used address information and other identifying information to ensure to the maximum extent possible that the company in violation was the same company that held federal contracts.

Neither the WHD nor OSHA enforcement data provide information that allowed Committee staff to identify the corporate structure of the entity listed in the data. In particular, the data does not establish whether or not the listed entity is a parent company, or a subsidiary or affiliate of a parent company. In order to accurately cross reference the name of the entity responsible for the misconduct with USA Spending, and to get a complete understanding of the corporate structure of the company named in the WHD and OSHA data, Committee staff sought to identify further information about the companies named in the database. The companies identified in the report are the ultimate parent company, or in the case of a company owned by a private equity company, the name of the private equity firm.

Correctly identifying the parent company of the firms listed in the data is difficult for a number of reasons. While in some cases, the entity listed is a parent company without subsidiaries, in general the entity in the data is not a parent company. For example, the company identified as responsible for the violation may be a parent company with subsidiaries, a subsidiary of a parent company, or a brand name under which a parent company, or subsidiary of a parent company, operates. Additionally, in some cases, the entity identified in the WHD or OSHA data may no longer exist as a result of a bankruptcy, may have legally change its name, or may have been purchased following the time in which the listed violation occurred. In these cases, Committee staff attributed the violation to the current parent company.

Given these challenges, Committee staff separately researched the corporate structure of entities that received large violations or assessments. For publicly traded companies, SEC reporting information was used to develop a list of jointly owned and affiliated companies. For private companies, information provided on their websites including annual reports and other investor information was consulted. As previously stated, in a number of instances the penalty or assessment was made against a company that has since been purchased or subsumed in a reorganization or bankruptcy. In these instances, the parent company similarly appears in the report, but the company that actually received the violation is also indicated. When a private equity fund is the full owner of a company they have been treated as a parent company.

In order to obtain the full universe of labor violations by the 49 companies identified, Committee staff took the compiled list of parent companies, subsidiaries and affiliates and ran those companies back through both the WHD and OSHA databases in order to determine if other penalties and assessments of

lesser magnitude had been issued against the corporate entity including subsidiaries, affiliates, franchises, dealers and/or retailers by either WHD or OSHA between 2007 and 2012. The results of that can be found in Appendix III.

In some cases, the parent company identified in the report has franchises or dealers listed in the DOL data that are not operated by the parent. For instance, BP PLC has a number of gas stations using the name BP that appear in the data. Similarly, a number of auto dealers use the name GM or Chrysler in their dealership, but are not technically owned by General Motors Corporation or Chrysler Group, LLC. In these cases, staff did not attribute these violations to the parent company for the purpose of evaluating the data in Table E. However, this information is included in Table F. Additionally, a more detailed listing of the number and type of violations, and the subsidiary or parent company against which they were assessed, can be found in Appendix 4. Appendix 5 also contains a detailed list of each violation (including cases that were investigated but in which no assessment or penalty was issued) attributed to the corporate entity.

Committee staff also sought information on the record of the companies that are federal contractors from two additional databases, the Excluded Parties List System (EPLS) and the Federal Awardee Performance Integrity Information System (FAPIIS). A third database available to contracting officers, the Past Performance Information Retrieval System (PPIRS), is not publicly accessible and was not consulted. PPIRS contains information on the past performance of a contractor. Under Subpart 42.15 of the FAR, agencies are generally required to evaluate contractors' performance on all contracts valued in excess of $150,000 when the contract is completed, or in the case of multi-year contracts, on an interim basis.[69] When evaluating past performance, agencies are required only to evaluate the contractor's performance on and efforts to achieve any small business subcontracting goals, although they are encouraged to consider other factors, such as:

> the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; the contractor's reporting into databases ...; the contractor's record of integrity and business ethics, and generally, the contractor's business-like concern for the interest of the customer.[70]

The Excluded Parties List System (EPLS), housed in the System for Acquisition Management at the General Services Administration, is used by contracting officers to determine whether or not a bidder has been suspended or debarred and is therefore ineligible to receive a contract. Companies that have been debarred, suspended, proposed for debarment, or otherwise declared ineligible from receiving federal contracts appear in EPLS. If a bidder is suspended or debarred, the contracting officer would not need to evaluate the contents of the bid, as that firm would be unable to receive the contract.[71]

FAPIIS, created as result of language contained in the fiscal year 2008 Defense Authorization bill, "contains brief descriptions of all civil, criminal, and administrative proceedings involving federal

[69] 48 C.F.R. §42.1502(b).
[70] 48 C.F.R. §42.1501.
[71] 48 C.F.R. §9.405.

contracts that resulted in a conviction or finding of fault, as well as all terminations for default, administrative agreements, and non-responsibility determinations relating to federal contracts, within the past five years for all persons holding a federal contract or grant worth $500,000 or more."[72] While FAPIIS has tremendous shortcomings described in the report, *some* federal contractors that have committed clear and unquestionable misconduct are contained in the database, which contracting officers are required to review prior to awarding a contract.[73]

As a practical matter, contracting officers access FAPIIS via the PPIRS system both of which are now housed at the General Services Administration.

The above explanation illustrates the challenges in using existing tools to clearly answer the question of what federal contractors have broken federal labor laws.

[72] KATE MANUEL, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS, CONGRESSIONAL RESEARCH SERVICE, (2011).
[73] Duncan Hunter National Defense Reauthorization Act for Fiscal Year 2009, Pub. L. No. 110-417, §872(b)(1) & (c), 122 Stat. 4356 (2008).

Appendix II: Top 100 Penalties and Violations WHD and OSHA 2007-2012 (contractors and non-contractors)

Companies Receiving Top 100 Back Pay Assessments 2007-2012			
Company	Date	Back Pay Assessment	Federal Contractor in 2012
Wal-Mart Stores, Inc.	7/30/2007	$30,857,205	No
Management & Training Corp	12/31/2009	$20,998,873	Yes
Puerto Rico Department of Corrections	4/24/2010	$7,863,202	Yes
Electronic Data Systems, Inc.	11/10/2007	$5,365,982	Yes
Manpower, Inc.	4/28/2007	$4,886,877	Yes
Cingular Wireless, LLC	1/19/2007	$4,711,767	Yes
Wal-Mart Stores, Inc.	3/31/2007	$4,594,735	No
Puerto Rico Department of Corrections	3/20/2010	$4,370,413	Yes
Washington Demilitarization Company LLC	2/13/2009	$4,268,624	Yes
Prince George's County Public Schools	12/31/2010	$4,222,146	No
Vangent, Inc.	1/31/2009	$2,976,667	Yes
Telos Corp	12/31/2009	$2,880,033	Yes
Nestle USA	12/15/2008	$2,750,840	Yes
Wackenhut Services, Inc.	9/30/2007	$2,541,364	Yes
Wal-Mart Stores, Inc.	1/31/2007	$2,478,757	No
Peri & Sons Farms, Inc.	12/31/2009	$2,338,700	No
Valley Baptist Health Systems	3/9/2011	$2,090,243	No
Maricopa County	3/4/2009	$2,082,072	No
Sandia Corp	5/21/2008	$2,023,671	Yes
S3 LTD	2/5/2007	$1,960,555	No
Greet America,, Inc.	9/29/2010	$1,832,518	No
CVR Energy,, Inc.	1/29/2011	$1,792,837	Yes
I.A.P. World Services, Inc.	9/30/2008	$1,788,002	Yes
Nestle USA, Inc.	12/15/2008	$1,752,293	Yes
VMT Long Term Care Management, Inc.	12/31/2008	$1,715,815	No
TAC Worldwide Consulting Group	10/21/2008	$1,710,169	No
Dismas Charities, Inc.	9/4/2010	$1,687,882	Yes
Delta-21 Resources, Inc.	9/29/2010	$1,674,340	Yes
TPUSA, Inc	4/9/2010	$1,670,856	No
Wal-Mart Stores, Inc.	1/31/2007	$1,654,184	No
URS Corp	10/27/2008	$1,580,037	Yes
S.I. International, Inc.	11/30/2007	$1,559,978	Yes
Win Wholesale, Inc.	1/7/2011	$1,557,933	No

Companies Receiving Top 100 Back Pay Assessments 2007-2012			
Company	**Date**	**Back Pay Assessment**	**Federal Contractor in 2012**
Puerto Rico Police	3/1/2009	$1,535,388	Yes
McLane Company, Inc.	8/10/2007	$1,461,902	No
Computer Sciences Corp	11/30/2007	$1,448,506	Yes
Total Enterprise, Inc.	11/7/2009	$1,371,389	No
Stanley Associates, Inc.	2/18/2011	$1,359,888	Yes
DSM Design Group, LLC	4/18/2008	$1,340,763	No
GEOPHARMA, Inc.	4/10/2010	$1,313,870	No
Pace Airlines, Inc.	9/26/2009	$1,313,611	No
Total Healthcare Staffing of Long Island, Inc	4/1/2008	$1,304,911	No
CAL Construction Co., Inc	10/30/2010	$1,300,000	No
Southern California Maids Service Inc	12/19/2009	$1,214,354	No
CMA Services, Inc.	4/1/2008	$1,210,012	No
Teachers Insurance Annuity Association	4/15/2007	$1,171,404	No
Desert Plastering, LLC	3/31/2007	$1,147,921	No
Beckman Coulter, Inc.	11/27/2009	$1,114,492	Yes
Rural/Metro Corp	6/24/2011	$1,109,697	Yes
Apex Systems Inc.	10/31/2011	$1,095,663	No
ProPetro Services, Inc	8/24/2009	$1,082,753	No
CDP Corp, Inc	1/6/2008	$1,046,678	No
Wal-Mart Stores, Inc.	1/31/2007	$1,035,239	No
Levi Strauss & Company	10/20/2010	$1,023,989	No
First Republic Bank	4/7/2012	$1,009,644	No
Pilgrim's Pride Corp	3/4/2010	$1,001,438	Yes
Ball Aerospace and Technologies Corp	4/7/2007	$976,328	Yes
Husky Energy, Inc./Lima Refining Company	3/14/2009	$969,182	Yes
Metropolitan Center for Mental Health	12/31/2011	$964,939	No
Olympus Corp of the Americas and its	8/16/2008	$956,774	Yes
Eurofresh, Inc.	12/31/2008	$937,690	No
United HealthCare Services, Inc.	10/10/2009	$934,551	Yes
THD At-Home Services, Inc.	1/31/2009	$920,940	Yes
Apex Systems Inc.	10/31/2011	$920,225	No
Progressive Technologies, Inc.	12/31/2009	$888,001	No
Alameda County Medical Center	8/13/2007	$873,361	No
CFI SALES & MARKETING, LLC	5/7/2009	$868,444	No
New United Motors Manufacturing Inc	9/30/2007	$862,285	No
Hawk One Security, Inc.- DC Public Schools	12/17/2009	$859,784	No

Companies Receiving Top 100 Back Pay Assessments 2007-2012			
Company	**Date**	**Back Pay Assessment**	**Federal Contractor in 2012**
Vanderbilt Police Department	6/7/2010	$845,705	Yes
Southwest Research Institute	2/13/2009	$843,965	Yes
Pason Systems USA Corp	9/15/2007	$841,825	No
Gwinnett Sprinkler Company	2/27/2010	$834,307	No
Alan Berman Trucking, Inc.	2/3/2007	$825,000	No
General Hospital Corp, The	3/21/2009	$812,036	No
Big Ridge, Inc.	4/16/2007	$809,993	No
Manganaro Midatlantic, LLC	4/30/2011	$795,873	No
Alliance Mechanical Inc	4/16/2011	$791,210	No
Superior Ambulance Service, Inc.	9/20/2009	$780,097	No
Sablan Construction Company, Ltd.	6/2/2008	$760,000	No
USProtect Corp	11/16/2012	$758,235	No
Kinder Morgan, Inc.	3/12/2010	$754,830	Yes
Farmer's Group, Inc.	9/17/2010	$754,148	No
Pactiv Corp	1/2/2011	$753,837	Yes
Arizona Pipeline Company	11/23/2009	$749,862	No
Quik Trip Corp	7/29/2008	$747,729	No
Puerto Rico Department of Justice	8/4/2012	$741,497	No
Guam Police Department	7/31/2007	$737,729	No
Morton Buildings, Inc.	10/13/2009	$731,678	No
Teltara, LLC	12/31/2011	$731,161	Yes
Flying J, Inc.	12/14/2008	$723,964	No
Lockheed Martin Operations Support, Inc.	2/13/2009	$723,686	Yes
Medassurant, Inc.	4/30/2010	$714,588	No
C & S Wholesale Grocers, Inc.	12/26/2007	$714,562	Yes
L-3 Communications Vortex Aerospace, LLC	3/5/2012	$713,947	Yes
US PROTECT Corp	3/14/2008	$709,147	No
Thomas Computer Solutions, LLC	1/5/2008	$700,000	No
American Bindery Depot, Inc	3/28/2010	$690,677	No
The Rochester General Hospital	8/31/2008	$690,374	No

Companies Receiving Top 100 OSHA Violations 2007-2012			
Company	**Sum of Initial Penalties**	**Sum of Current Penalties**	**Federal Contractor in 2012?**
BP Products North America, Inc.	$30,730,000.00	$30,730,000.00	Yes
BP Products North America, Inc.	$21,156,500.00	$21,156,500.00	Yes
O&G Industries Inc.	$8,295,000.00	$8,295,000.00	No
Dayton Tire Company	$7,490,000.00	$7,490,000.00	No
Keystone Construction & Maintenance	$6,636,000.00	$6,636,000.00	No
Arcadian Corp	$5,085,000.00	$5,085,000.00	No
Imperial Sugar Company; Imperial-Savannah, L.P.	$5,062,000.00	$4,050,000.00	Yes
E. Smalis Painting Company	$5,008,500.00	$1,092,750.00	No
Imperial Sugar Company; Imperial-Savannah, L.P.	$3,715,500.00	$2,000,000.00	Yes
Tyson Meats, Inc.	$3,133,100.00	$532,030.00	Yes
BP Products N. America, Inc.,&BP-Husky Refining LLC	$3,042,000.00	$3,042,000.00	Yes
Cintas Corp	$2,782,000.00	$2,494,043.50	Yes
C-P-C-G Oklahoma City Plant-General Motors Corp.	$2,780,000.00	$2,780,000.00	Yes
BP Products North America, Inc.	$2,415,000.00	$2,415,000.00	Yes
Shell Anacortes Refining	$2,393,000.00	$2,393,000.00	Yes
Southern Scrap Materials Company, Inc.	$2,026,700.00	$2,026,700.00	No
Whitesell Corp	$2,017,500.00	$2,017,500.00	No
Thomas Industrial Coatings, Inc.	$1,848,000.00	$1,848,000.00	No
Jindal United Steel	$1,665,000.00	$571,150.00	No
South Dakota Wheat Growers Association	$1,624,000.00	$1,792,000.00	No
Tempel Grain Elevators, LLP	$1,592,500.00	$45,460.00	No
Midwest Steel Inc	$1,520,000.00	$140,000.00	No
Eric K Ho Individually And DBA Ho Ho Ho Express	$1,411,200.00	$1,411,200.00	No
Manganas Painting Co., Inc.	$1,319,850.00	$1,145,890.00	No
Manganas Painting Co., Inc.	$1,318,500.00	$334,850.00	No
Daimler Chrysler Corp	$1,289,200.00	$1,289,200.00	Yes
VT Halter Marine, Inc.	$1,286,000.00	$1,263,000.00	Yes
G.S. Robins & Company D.B.A. Ro-Corp, Inc.	$1,277,000.00	$700,000.00	No
Amd Industries, Inc.	$1,247,400.00	$1,247,400.00	No
Black Mag LLC, DBA BMI & DBA Black Mag Industries	$1,232,500.00	$1,232,500.00	No
AWC Frac Valves Inc	$1,225,000.00	$105,000.00	No
Goodman Manufacturing Company, L.P.	$1,215,000.00	$550,000.00	Yes
Pretium Packaging L.L.C.	$1,178,100.00	$500,000.00	No
Doe Run Company	$1,167,600.00	$396,140.00	No

Companies Receiving Top 100 OSHA Violations 2007-2012			
Company	Sum of Initial Penalties	Sum of Current Penalties	Federal Contractor in 2012?
Bluewater Energy Solutions, Inc.	$1,148,000.00	$686,000.00	No
Milk Specialties Company	$1,145,200.00	$1,480,000.00	No
Manganas Painting Co., Inc.	$1,134,000.00	$938,100.00	No
Beef Products, Inc.	$1,102,500.00	$648,000.00	Yes
Ces Environmental Services, Inc.	$1,092,000.00	$1,092,000.00	No
E.N. Range, Inc.	$1,035,600.00	$1,035,600.00	No
Allen Family Foods, Inc.	$1,034,000.00	$521,000.00	No
Tyler Pipe Company	$1,015,000.00	$1,015,000.00	No
Piping Technology & Products, Inc.	$1,013,000.00	$1,013,000.00	No
Silver Eagle Refining Inc	$1,006,400.00	$1,006,400.00	No
NDK Crystals, Inc.	$1,000,000.00	$180,000.00	No
Butterball Turkey Company	$998,360.00	$425,000.00	Yes
E.N. Range, Inc.	$980,000.00	$980,000.00	No
Whitesell Corp	$926,000.00	$798,000.00	No
160 Broadway Corp DBA Broadway Concrete	$888,000.00	$738,000.00	No
Cooperative Plus, Inc.	$861,000.00	$516,350.00	No
RPI Coating, Inc.	$845,100.00	$100,000.00	No
Scott Paper Company, Northeast Div.	$813,000.00	$475,000.00	No
PI Trailers Mfg., Co., Inc.; Delco Trailers	$810,700.00	$810,700.00	No
Insituform Technologies USA, Inc.	$808,250.00	$733,750.00	Yes
John J. Steuby	$788,000.00	$176,200.00	No
Wrr Environmental Services Co, Inc.	$787,000.00	$340,000.00	No
Americold Logistics LLC	$740,400.00	$430,300.00	Yes
Severstal North America, Inc.	$731,790.00	$312,196.00	No
Avondale Industries, Inc., Steel Sales Div.	$717,000.00	$717,000.00	Yes
Navajo Refining Company, LLC	$707,000.00	$400,000.00	No
Tribe Mediterranean Foods, Incorporated	$702,300.00	$540,000.00	No
A-1 Excavating, Inc	$693,000.00	$360,000.00	No
Jacksonville Shipyard, Inc.	$692,000.00	$692,000.00	No
Interstate Brands Corp	$663,000.00	$112,500.00	Yes
Lanzo Construction Co	$657,500.00	$657,500.00	No
SSAB Iowa, Inc.	$643,500.00	$643,500.00	No
Midwest Canvas Corp	$642,000.00	$447,000.00	Yes
Mar-Jac Poultry, Inc.	$627,750.00	$175,750.00	No
Roanoke Belt, Inc.	$610,325.00	$610,325.00	No
Tewksbury Industries, Inc.	$600,000.00	$600,000.00	No

Companies Receiving Top 100 OSHA Violations 2007-2012			
Company	**Sum of Initial Penalties**	**Sum of Current Penalties**	**Federal Contractor in 2012?**
Interstate Brands Corp	$600,000.00	$75,000.00	Yes
Hermes Abrasives, Ltd.	$567,500.00	$10,000.00	No
Republic Engineered Products, Inc.	$563,000.00	$235,000.00	No
U.S. Postal Service	$558,000.00	$558,000.00	Yes
Haasbach, LLC	$555,000.00	$200,000.00	No
Kief Industries, Inc. DBA Excelsior Brass Works	$550,400.00	$550,400.00	No
C. A. Franc Construction	$539,000.00	$539,000.00	No
Saw Pipes USA, Inc.	$536,000.00	$300,000.00	No
American Resources Inc	$515,250.00	$515,250.00	No
Thomas Industrial Coatings, Inc.	$514,500.00	$514,500.00	No
Loren Cook Company	$511,000.00	$511,000.00	No
HI Crouse Construction Co.	$510,750.00	$510,750.00	No
Western Extrusions Corp	$504,000.00	$120,150.00	No
The Massaro Company	$504,000.00	$56,000.00	No
The Toro Company	$490,000.00	$42,000.00	Yes
Parker Hannifin Corp	$487,700.00	$321,920.00	Yes
Quality Stamping Products Co.	$485,000.00	$140,600.00	No
Cambria Contracting Incorporated	$484,000.00	$29,000.00	No
Welch Group Environmental LLP And Glenn Welch	$480,000.00	$480,000.00	No
Midwest Racking Manufacturing, Inc.	$478,600.00	$318,600.00	No
Bostik, Inc.	$476,000.00	$300,000.00	Yes
Boomerang Tube, LLC	$468,000.00	$468,000.00	No
U.S. Minerals, LLC	$466,400.00	$466,400.00	No
Southern Pan Services Company	$460,000.00	$460,000.00	No
Damalos & Sons, Inc.	$456,000.00	$456,000.00	No
Benchmark Construction Co.,Inc.	$453,000.00	$318,000.00	No
Pilkington North America Inc	$453,000.00	$453,000.00	No
Trinity Industries Caruthersville	$448,500.00	$350,500.00	No
Richard E. Fowler, Inc.	$448,000.00	$350,000.00	No
Bath Iron Works	$441,500.00	$324,000.00	Yes
Bostik, Inc.	$441,000.00	$300,000.00	Yes

Appendix III: 49 Federal Contractors with Multiple Violations 2007-2012, Grouped by Subsidiary

Parent Company / Subsidiaries	Violations			Penalties
	Wage	OSHA	Total	
Aegion Corp				
Bayou Coating, LLC		1	1	$700
Brinderson Engineers & Constructors		1	1	$18,000
Corrpro Companies, Inc.		4	4	$55,180
Fibrwrap Construction, Inc.		2	2	$3,700
Insituform Technologies, Inc.		5	5	$821,500
Total	**0**	**13**	**13**	**$899,080**
Americold				
Parent and Similarly Named Entities		5	5	$20,580
Americold Logistics		50	50	$1,621,676
Americold Nebraska Leasing, LLC		1	1	$4,500
Americold Realty Trust		3	3	$4,625
Atlas Cold Storage	1	3	4	$37,556
Versacold Logistics		11	11	$187,870
Total	**1**	**73**	**74**	**$1,876,807**
AT&T				
Parent and Similarly Named Entities	6	53	59	$309,174
Illinois Bell		7	7	$82,000
AT&T Mobility	2	9	11	$20,838
Bellsouth		5	5	$7,588
Pacific Bell		35	35	$60,035
SBC Communications		13	13	$78,990
Cingular Wireless	2		2	$5,108,549
Subtotal	**10**	**122**	**132**	**$5,667,174**
AT&T Retailers	8	4	12	$42,168
Total	**18**	**126**	**144**	**$5,709,342**

Parent Company Subsidiaries	Violations			Penalties
	Wage	OSHA	Total	
Ball Corp				
Parent and Similarly Named Entities		12	12	$89,940
Ball Aerosol And Specialty Container, Inc.		4	4	$28,125
Ball Aerospace & Technologies Corp	1	1	2	$978,578
Ball Metal Beverage Container Corp		1	1	$5,525
Ball Metal Food Container, LLC		1	1	$1,870
Ball Plastic Container Corp		2	2	$10,985
Heekin Can, Inc.		2	2	$1,060
Total	**1**	**23**	**24**	**$1,116,083**
Beef Products		**8**	**8**	**$1,141,905**
BP				
BP Husky Refining, LLC		2	2	$3,063,000
BP America, Inc. Rig 291		1	1	$1,275
BP Whiting Business Unit		2	2	$394,250
BP Arkoma		1	1	$975
BP Concrete		1	1	$750
BP Construction, LLC		1	1	$1,250
BP Exploration Alaska, Inc.		11	11	$173,925
BP Products North America, Inc.		8	8	$54,645,500
BP Solar International, Inc.		1	1	$6,175
BP West Coast Products, LLC		3	3	$38,460
BP/Arco Petroleum Products Carson		1	1	$27,500
Alyeska Pipeline Service Company		2	2	$1,650
Omega Oil & Gas Services, Inc.		1	1	$2,975
Subtotal		**35**	**35**	**$58,357,685**
BP Retailers	125	9	133	$1,382,048
Total	**125**	**44**	**168**	**$59,739.733.07**
C&S Wholesale Grocers				
Parent and Similarly Named Entities	3	36	39	$1,285,331
Erie Logistics, LLC	0	3	3	$7,600
Piggly Wiggly	0	4	4	$10,200
Total	**3**	**43**	**46**	**$1,303,131**

Parent Company Subsidiaries	Violations			Penalties
	Wage	OSHA	Total	
Cerberus Capital Management				
IAP Worldwide Services Inc	5	2	7	$1,863,607
Total	**5**	**2**	**7**	**$1,863,607**
CGI				
Parent and Similarly Named Entities	0	4	4	$33,420
CGI International, Inc.	0	1	1	$9,150
Stanley Associates, Inc.	2	4	6	$1,531,679
CGI Federal, Inc.	2	0	2	$134,149
Total	**4**	**9**	**13**	**$1,708,397**
Chrysler	0	24	24	$174,485
Daimler Chrysler Corp	1	10	11	$1,358,229
Jeep Corp	0	1	1	$9,200
Mb Tech Autodie LLC	0	1	1	$1,800
Subtotal	**1**	**36**	**37**	**$1,543,714**
Chrysler Autodealers	53	96	149	$778,576
Total	**54**	**132**	**186**	**$2,322,289**
Cintas Corp				
Parent and Similarly Named Entities	2	58	60	$3,362,170
Millennium Mats	0	1	1	$31,200
Total	**2**	**59**	**61**	**$3,393,370**
Computer Sciences Corp	7	12	19	$1,788,801
CSC Applied Technologies LLC	1	0	1	$268,635
Total	**8**	**12**	**20**	**$2,057,436**
CVR Energy				
Wynnewood Refining Company	0	5	5	$607,100
Coffeyville Resources Refining & Marketing LLC	1	2	3	$1,923,837
Coffeyville Resources Nitrogen Fertilizer LLC	0	2	2	$85,050
Total	**1**	**9**	**10**	**$2,615,987**

Parent Company Subsidiaries	Violations Wage	 OSHA	 Total	Penalties
Daikin Industries				
Goodman Manufacturing Company	1	11	12	$1,421,485
Goodman Construction Company LLC	0	1	1	$3,450
Goodman Company LP	0	3	3	$5,600
Goodman Air Conditioning & Refrigeration, Inc.	0	1	1	$1,500
Sauer Danfoss	0	3	3	$7,450
AAF International	0	3	3	$16,500
Total	**1**	**22**	**23**	**$1,455,985**
Danaher Corp				
Parent and Similarly Named Entities	0	1	1	$1,950
Danaher Tool Group	0	4	4	$287,100
Dynapar Corp	0	1	1	$9,100
Danaher Construction Services	0	1	1	$4,050
Easco Hand Tools	0	1	1	$2,615
Danaher Controls	0	1	1	$1,750
Beckman Coulter	2	2	4	$1,129,911
American Precision Industries, Inc.	0	2	2	$1,035
Chemtreat, Inc.	0	1	1	$4,000
Dental Equipment LLC	0	1	1	$3,150
Fluke Corp	0	1	1	$3,150
Hach Company, Inc.	0	1	1	$2,275
Hennessy Industries, Inc.	0	2	2	$20,375
Janos Technology, Inc.	0	1	1	$5,750
Kerr Corp	0	3	3	$6,600
Kollmorgen Corp	0	1	1	$1,575
Ormco Corporation	0	2	2	$23,535
Pacific Scientific Energetic Materials Company	0	5	5	$99,175
Tektronix, Inc.	0	1	1	$605
Veeder-Root Company	0	1	1	$7,000
Total	**2**	**33**	**35**	**$1,614,701**
Delta-21	**1**	**0**	**1**	**$1,674,340**
Dismas Charities	**4**	**0**	**4**	**$1,750,691**

Parent Company / Subsidiaries	Violations			Penalties
	Wage	OSHA	Total	
G4 Secure Solutions				
Parent and Similarly Named Entities	9	4	13	$93,853
G4s Security Services	1	3	4	$71,585
Wackenhut Corp	20	6	26	$3,208,064
G4s Youth Services LLC	1	0	1	$3,516
Total	**31**	**13**	**44**	**$3,377,018**
General Dynamics				
Parent and Similarly Named Entities	0	1	1	$800
Bath Iron Works	0	4	4	$655,200
General Dynamics Armament And Technical Products	0	4	4	$59,025
General Dynamics Land Systems	0	7	7	$74,210
General Dynamics Satcom Technologies	0	2	2	$25,350
General Dynamics C4 Systems	0	2	2	$28,000
General Dynamics Ordnance And Tactical Systems	0	2	2	$24,400
General Dynamics Information Technology	3	2	5	$278,422
General Dynamics Electric Boat Division	1	1	2	$10,052
General Dynamics Robotics Systems, Inc.	0	1	1	$1,500
General Dynamics Advanced Information Systems	0	1	1	$900
General Dynamics Fort Worth Div	0	1	1	$350
Axletech International	0	1	1	$6,000
Electric Boat Corp	0	3	3	$10,925
Force Protection Industries, Inc.	0	2	2	$34,875
Earl Industries	0	3	3	$16,675
Gulfstream Aerospace Corp	0	3	3	$38,350
Jet Aviation Teterboro, LP	0	2	2	$21,600
Jet Aviation Of America, Inc.	0	1	1	$10,000
Metro Machine Corp	0	2	2	$12,700
Nassco	0	9	9	$60,390
National Steel And Shipbuilding Company	0	25	25	$497,400
Vangent, Inc.	2	0	2	$2,981,950
Total	**6**	**79**	**85**	**$4,849,075**

Parent Company Subsidiaries	Violations Wage	 OSHA	 Total	Penalties
General Motors Corp Parent and Similarly Named Entities	3	46	49	$3,039,178
Proterra Inc	0	1	1	$3,300
The Nanosteel Company, Inc.	0	2	2	$5,570
Chevrolet Motor Div Tonawanda	0	1	1	$300
Avon Automotive Cadillac Operations	0	1	1	$5,250
GMC Trucking And Excavation, Inc.	1	0	1	$13,379
Subtotal	**4**	**51**	**55**	**$3,066,978**
General Motors Corp Autodealers	80	228	308	$1,523,370
Total	**84**	**279**	**363**	**$7,657,325**
The Home Depot Parent and Similarly Named Entities	**7**	**241**	**248**	**$2,606,863**
Hewlett Packard Parent and Similarly Named Entities	2	3	5	$54,010
Electronic Data Systems	3	3	6	$5,797,559
Total	**5**	**6**	**11**	**$5,851,569**
Huntigton Ingalls	0	2	2	$159,300
Amsec LLC	0	2	2	$9,640
Continental Maritime	0	1	1	$21,560
Ingalls Shipbuilding	0	1	1	$7,000
Newport News Shipbuilding And Drydock Company	0	1	1	$5,000
Avondale Industries, Inc.	0	2	2	$717,630
Titan Ii, Inc.	1	0	1	$4,328
Total	**1**	**9**	**10**	**$924,458**
Husky Energy				
Bp - Husky Refining LLC	0	2	2	$3,063,000
Lima Refining Company	1	2	3	$1,039,807

Parent Company Subsidiaries	Violations			Penalties
	Wage	OSHA	Total	
JBS	0	6	6	$68,900
Pilgrim's Pride Corp	3	44	47	$1,822,936
Swift & Company	4	20	24	$295,588
JBS Carriers, Inc.	0	1	1	$1,750
JBS Enterprises, Inc.	0	1	1	$2,625
JBS Five Rivers Ranch Cattle Feeding LLC	0	4	4	$33,925
JBS USA LLC	3	8	11	$126,420
Total	**10**	**84**	**94**	**$2,352,144**
Kinder Morgan	3	5	8	$815,810
Kinder Morgan Energy Partners LP	3	3	6	$156,750
Kinder Morgan Liquids Terminals LLC	1	5	6	$66,509
Kinder Morgan Chesapeake Bulk Terminal	0	1	1	$7,000
Kinder Morgan Arrow Terminals	0	1	1	$14,000
Kinder Morgan Bulk Terminals, Inc.	0	7	7	$29,412
Kinder Morgan Terminals	0	1	1	$4,125
Kinder Morgan Berkeley	0	1	1	$3,900
Kmgp Services Company, Inc.	4	0	4	$51,277
Kinder Morgan Petcoke LP	1	0	1	$4,580
Kinder Morgan Cochin LLC	1	0	1	$932
Total	**13**	**24**	**37**	**$1,154,295**
L-3 Communications Parent and Similarly Named Entities	0	5	5	$18,610
L3 Communications Unidyne	0	1	1	$10,125
L3 Communications Combat Propulsion Systems	0	1	1	$8,360
L-3 Communications-Vertex Aerospace	5	2	7	$707,632
L-3 Communications Electron Technologies, Inc.	0	1	1	$375
Power Paragon, Inc.	0	1	1	$420
Microdyne Outsourcing Inc.	1	0	1	$4,505
Crestview Aerospace	1	0	1	$399
L-3 Communications Vortex Aerospace LLC	2	0	2	$719,606
L-3 Services, Inc.	1	0	1	$26,965
L-3 Communications Aerospace LLC	1	0	1	$2,995
Total	**11**	**11**	**22**	**$1,499,992**

Parent Company Subsidiaries	Violations Wage	 OSHA	 Total	Penalties
Lockheed Martin				
Parent and Similarly Named Entities	8	7	15	$215,919
Kelly Aviation Center	0	2	2	$13,000
Lockhead California Company	0	3	3	$1,550
Lockheed Martin Aeronautics Company	0	2	2	$19,500
Lockheed Martin Aspen Systems Corporation	0	1	1	$15,875
Lockheed Martin, Rts-Medical-Camp Parks, CSTC	0	2	2	$8,663
Lockheed Space Operations Company	0	1	1	$660
Lockheed Martin Operations Support, Inc.	1	0	1	$8,426
Lockheed Martin Informations Technology	1	0	1	$21,330
Lockheed Martin Services, Inc.	3	0	3	$56,513
Lockheed Martin Global Training & Logistics	2	0	2	$6,164
Lockheed Martin Government Services, Inc.	1	0	1	$24,827
Lockheed Martin Operations Support, Inc.	2	0	2	$759,868
Sandia National Laboratories	2	0	2	$2,077,247
Total	**20**	**18**	**38**	**$3,229,543**
Louis Dreyfus				
Parent and Similarly Named Entities	0	1	1	$150
Louis Dreyfus Citrus Inc.	0	2	2	$11,425
Imperial Sugar Company	0	3	3	$8,789,500
Ld Commodities	0	1	1	$3,188
Total	**0**	**7**	**7**	**$8,804,263**
Management and Training Corp				
And Similarly Named Entities	7	4	11	$21,357,490
Hawaii Job Corps Center	0	1	1	$560
Mtc East Texas Treatment Facility	1	0	1	$133,238
Management Training Corp Taft Correctional Institution	1	0	1	$18,107
Keystone Job Corps Center	1	0	1	$28,634
Total	**10**	**5**	**15**	**$21,538,030**

Parent Company / Subsidiaries	Violations			Penalties
	Wage	OSHA	Total	
Manpower Group	5	25	30	$5,099,600
The Greenwood Group	0	1	1	$8,580
Clmp Limited	0	1	1	$5,000
Manpower Staffing, Inc.	0	2	2	$5,750
Experxis US, Inc.	1	0	1	$41,111
Acz, Inc.	1	0	1	$4,721
Cpm, LTD	1	0	1	$1,179
Marvatemp Inc./Interbake Foods LLC	1	0	1	$500
Total	**9**	**29**	**38**	**$5,166,441**
Nestle	0	5	5	$51,250
Vitality Foodservice, Inc., Dba Nestle Professional	0	1	1	$1,635
Dreyers	0	11	11	$84,250
Nestle Prepared Foods Company	11	9	20	$872,900
Nestle Purina Pet Care Company	0	12	12	$51,495
Nestle USA	7	15	22	$5,715,792
Nestle Water North America	1	12	13	$61,930
Jenny Craig	0	2	2	$1,120
Gerber Products Company, Inc.	0	1	1	$3,000
Labor Leaders-Nestle	1	0	1	$5,961
Nesco-Nestle	1	0	1	$2,280
Nestle Toll House Cafe	1	0	1	$1,682
Total	**22**	**68**	**90**	**$6,853,295**
Olympus Corp	1	0	1	$956,774
Olympus Medical Equipment Services America, Inc.	0	1	1	$18,420
Total	**1**	**1**	**2**	**$975,194**
Parker Hannifin	0	49	49	$758,125
Brown Manufacturing Corporation	0	1	1	$500
Velcon Filters LLC	0	4	4	$12,998
Taiyo America, Inc.	0	2	2	$5,503
Total	**0**	**56**	**56**	**$777,126**

Parent Company Subsidiaries	Violations			Penalties
	Wage	OSHA	Total	
Reynolds Group	0	23	23	$344,709
Pactiv	3	20	23	$1,106,922
Evergreen Packaging	0	1	1	$1,000
Dopaco, Inc.	0	2	2	$7,745
Graham Packaging Company LP	2	11	13	$92,878
Total	**5**	**57**	**62**	**$1,553,253**
Seaboard Corp and Maxwell Farm Joint Venture				
Butterball LLC	0	9	9	$1,036,535
Jacintoport International	0	2	2	$14,075
Seaboard Farms, Inc.	0	3	3	$146,325
Seaboard Foods LP	0	6	6	$66,625
Seaboard Marine	0	6	6	$37,725
Total	**0**	**26**	**26**	**$1,301,285**
Serco Group	4	3	7	$230,339
Serco Construction Group Ltd	0	1	1	$7,500
Serco Management Services, Inc.	1	1	2	$6,834
Serco Dba Comfort Suites	1	0	1	$2,630
S.I. International, Inc.	1	0	1	$1,559,978
Total	**7**	**5**	**12**	**$1,807,281**
Southwest Research Institute	**2**	**0**	**2**	**$1,396,352**
ST Engineering				
Vt Halter Marine, Inc.	**0**	**3**	**3**	**$1,322,975**
Telos	**1**	**0**	**1**	**$2,880,033**
Teltara	**8**	**0**	**8**	**$1,038,017**

Parent Company Subsidiaries	Violations			Penalties
	Wage	OSHA	Total	
Tesoro Corporation				
Tesoro Refining and Marketing Company	0	9	9	$163,885
Atlantic Richfield Company (ARCO)	0	8	8	$54,250
Tesoro Hawaii Corp	2	2	4	$146,294
Tesoro Shell Anacortes	0	2	2	$2,399,000
Tesoro Alaska Company	0	3	3	$12,300
Subtotal	**2**	**24**	**26**	**$2,775,730**
Tesoro Retailers	14	7	21	$75,535
Total	**16**	**31**	**47**	**$2,851,265**
Toro Company	**0**	**4**	**4**	**$515,350**
Total S.A.				
Bostik, Inc	0	6	6	$944,075
Hutchinson Sealing Systems Inc	0	1	1	$350
Total Petroleum Puerto Rico Corp.	0	1	1	$446
Paulstra	0	1	1	$7,350
Cook Composites and Polymers	0	3	3	$80,875
Total Petrochemicals USA, Inc.	0	1	1	$27,425
Total	**0**	**13**	**13**	**$1,060,521**
Tyson Foods	1	67	68	$1,799,738
Tyson Shared Services, Inc.	0	13	13	$637,525
Tyson Chicken, Inc.	0	8	8	$434,650
Tyson Fresh Meats, Inc.	0	44	44	$3,593,450
Tyson Deli, Inc.	0	4	4	$180,043
Tyson Prepared Foods, Inc.	0	11	11	$173,025
Tyson Chick N Quick	0	1	1	$11,000
Tyson Farms, Inc.	0	1	1	$813
Tyson Sign Company, Inc.	0	3	3	$1,825
IBP Inc	0	1	1	$61,500
Madison Food Corporation	0	1	1	$2,975
The Bruss Company	0	1	1	$1,350
Zemco Industries, Inc., Del	0	1	1	$2,295
Carolina Foods, Inc.	0	2	2	$18,325
Carneco Foods LLC	0	3	3	$10,500
Total	**1**	**161**	**162**	**$6,929,014**

Parent Company Subsidiaries	Violations Wage	 OSHA	 Total	Penalties
UnitedHealth Group				
Connextions, Inc.	1	1	2	$1,177
Preferred Care Partners	2	0	2	$1,696
Inspiris, LLC	1	0	1	$37,583
Healthpro	1	0	1	$13,217
Evercare Hospice, Inc.	1	0	1	$20,472
United Healthcare Services, Inc.	2	0	2	$955,369
Total	**8**	1	**9**	**$1,029,514**
URS Corp	3	15	18	$1,652,933
URS Energy & Construction	0	2	2	$10,400
Cleveland Wrecking Company	0	3	3	$4,205
Flint Energy & Services, Inc.	2	8	10	$298,812
URS Federal Services	4	0	4	$78,736
EG&G	1	0	1	$4,268,624
Total	**10**	**28**	**38**	**$6,313,710**
Total, All 49 Companies	**247**	**1,529**	**1,776**	**$196,368,683**

WATCHING WASHINGTON AND THE WORLD McClatchyDC

MISCLASSIFIED
CONTRACT TO CHEAT

For Florida companies that play by rules, success is tough as nails

By Nicholas Nehamas

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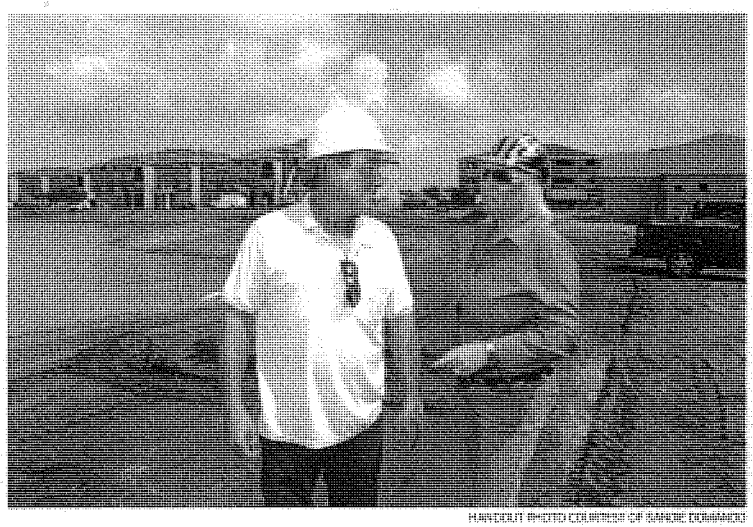

Sandie Domando, right, talks with her colleague Dennis Jaquot at a job site in Pompano Beach. Domando said her company refused to push its workers off of payroll and into limbo as unethical competitors did. "There are families out there that depend on us," Domando said.

president, has little interest in bidding for government work.

"We bid it to win," Domando said. "And we know we don't have a chance on most of those government jobs."

CONTRACT TO CHEAT

Workers don't have protections. Companies don't withhold taxes. Regulators don't seem to care. McClatchy reporters spent a year unraveling the scheme, using little-noticed payroll records that show how widespread this practice has become and what it costs us.

Read the full series

But during the recession, when the shock waves of the financial crisis nearly toppled America's construction industry, government work was the only option on the table. Private work had dried up. Concrete Plus went after contracts for 20 jobs with state or federal funding, mainly projects to build or improve low-income housing. It won just seven, well below the company's usual rate of success.

And Domando says she knows why: "We were getting underbid by companies that were cheating."

A yearlong investigation by the Miami Herald and McClatchy Newspapers seemed to confirm Domando's suspicions. The investigation, which looked at the misclassification of workers in Florida and 27 other states, found that unethical contractors were able to work on stimulus-funded building projects even as they ignored labor laws and avoided paying state and federal taxes.

"It is a formidable cost to be a legitimate contractor complying with all the rules."

The construction industry alone accounts for billions of dollars in lost tax revenue nationwide.

The scheme is simple: Instead of treating workers as regular employees, companies classify them as independent contractors.

wages or file unemployment taxes. Their labor costs are significantly lower than companies like Domando's that obey the law. And their workers have to pay their own taxes at a higher rate than if they were employees, although many self-employed workers ultimately pay just a fraction of the taxes they owe, according to the Internal Revenue Service.

"There's always going to be a scheme to avoid your taxes or any other cost of doing business the right way," said Doug Buck, director of governmental affairs for the Florida Home Builders Association. "It is a formidable cost to be a legitimate contractor complying with all the rules." When companies are allowed to cheat, Buck said, law-abiding competitors don't get the business they deserve.

The Herald reviewed thousands of pages of payroll records for 29 major government-backed projects built in Florida from 2009 through 2013. Seven other McClatchy newspapers, the McClatchy Washington bureau and ProPublica, a nonprofit investigative newsroom based in New York City, reviewed about 170 projects from 27 other states. In Florida, the Herald's analysis showed that one in five companies wrongly treated their workers as independent contractors.

Concrete Plus wasn't among them.

In fact, the company paid taxes on more employees than any other contractor on the projects reviewed by the Herald — 218 workers in total on three jobs. Domando said she and company owner Michael Gillette have no interest in pushing tax obligations onto their workers. "Our employees depend on us," she said. "There are families out there that depend on us." The intentional misclassification of a worker is a felony under Florida law.

No single test can determine whether someone is an independent contractor or an employee. But independent contractors are usually skilled workers who run their own businesses and work for a number of different companies. They are often called "1099" workers, after the tax form they receive from employers.

"We have no 1099 employees at all. Not a single one."

Sandie Domando, Concrete Plus

The Roosevelt C. Sands Jr. Housing Complex, a low-income housing project in Key West, had more 1099 workers than any other project examined by the Herald.

Sandie Domando, vice president at Concrete Plus

"1099 workers are especially common among highly skilled and licensed mechanics such as plumbers and electricians," said J. Manuel Castillo, director of the Housing Authority of Key West, explaining why his agency allowed employers to classify 154 workers as contractors on the project.

But the Herald's analysis showed that companies on the Roosevelt Sands job were actually treating workers with less training and education as contractors, not highly skilled workers. That was true on all the projects examined by the Herald.

contrast, just 2 percent of electricians, plumbers and heavy equipment operators were listed as being independent.

"We have no 1099 employees at all. Not a single one," said Domando. "No guy swinging a hammer on these construction sites should be a 1099." Domando's crew had a variety of workers, according to the payroll records, including carpenters, masons, laborers, metal workers and heavy equipment operators.

The recession was a frustrating experience for Domando. The company couldn't hit the low numbers that general contractors wanted on their bids and, as a result, fired workers. From a pre-recession peak of 250 employees, Domando estimated that the company withered to a payroll of 150 when work was at its scarcest.

"And the projects we did get, those were just to keep people employed," Domando said. "The margins were really, really thin on those jobs. Razor thin."

"We were doing it to keep people in their jobs," Domando added. She said the company broke even and sometimes lost money on government work.

With the economy in recovery mode, Domando said Concrete Plus' portfolio is once again almost all private work.

That's good news for the company but bad news for workers' wages.

On government jobs, wages are fixed according to the Davis-Bacon Act, a 1930s-era law that provides fair pay for workers. Since wages are a set cost on Davis-Bacon projects — the same for every company — the savings from pushing taxes onto workers can be the difference between winning and losing a contract. That's not as true on private jobs, where the market sets wages — significantly lower than the government-imposed rate — and there's more work to go around. A metal worker on a Davis-Bacon job might make $33 an hour, according to Domando, and only $18 or $19 for private work. "It's hard for them to go back to that after doing a government job," she said.

WATCHING WASHINGTON AND THE WORLD McClatchyDC

MISCLASSIFIED
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1: GOVERNMENT STIMULUS. Washington sent $840 billion to communities across the country to jump-start construction projects - and the economy. Federal funds flowed as businesses earned contracts and workers made money.

GRAPHIC: ALVARO VALINO, SPECIAL TO MCCLATCHY

But even in the private sector, misclassification presents a problem, Domando said. The pressure for low bids means law-abiding companies must cut wages to compete with their rule-breaking competitors. When cheaters are allowed to prosper, workers get lower pay.

Workers in many major construction trades have had to live with flat or declining pay over the past four decades, according to national data collected by the University of Minnesota. Some construction workers, including many Floridians, have seen a dramatic drop in wages tied to the erosion of America's middle class. In 1970, the average carpenter in Florida made nearly $32,000 in today's dollars. In 2012, the last year for which data is available, carpenters made just $14,400 on average. Florida roofers saw their average wages fall from $28,400 to $20,800 between 1970 and 2012. Drywallers have lost more than $20,000 from their average yearly paycheck in Florida. They now make just $14,100 per year.

"With those government jobs, it's just not a fair playing field," Domando said. "And that means that the tax money that we're paying in — that everybody's paying in — the government isn't spending it on the people that need it."

Domando said authorities at the local level didn't even seem aware of the independent contractor problem. Neither did their federal supervisors at the Department of Housing and Urban Development. To do government work, every company must attend a series of classes held by the developer and local officials

"1099 did not come up once in those meetings," Domando said.

More stories in Part 4:

Companies win federal contracts while flouting labor law

Tips for business owners to avoid misclassifying workers

N.C. plumbing firm may have broken rules

Doing it by the book, even when it hurts

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Workers don't have protections. Companies don't withhold taxes. Regulators don't seem to care. McClatchy reporters spent a year unraveling the scheme, using little-noticed payroll records that show how widespread this practice has become and what it costs us.

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Evan Benn of the Miami Herald and David Raynor of The News & Observer in Raleigh, N.C., contributed to this article. Locke reports for The News & Observer. Nehamas reports for the Miami Herald. We want to know your thoughts and experiences with misclassification. Share your feedback directly with the reporters: mlocke@newsobserver.com or 919-829-8927; or fordonez@mcclatchydc.com or 202-383-0010; or nnehamas@miamiherald.com or 305-376-4960; or on Twitter @mandylockenews, @francoordonez, @NickNehamas.

Ms. WILSON of Florida. Thank you, Mr. Speaker—Mr. Chair.

Chairman WALBERG. I thank the gentlelady, and I would appreciate not being given that title.

I too want to thank the members—witnesses who are here today. I appreciate your time and attention from all sides of the issue, to speak to us, to listen to our questions and concerns, and to sit there and wish that we asked some other questions, as well, to get the nub of it. We will have that opportunity. We would appreciate your response.

The letter that I received from multiple business organizations—H.R. Policy Association, U.S. Chamber of Commerce, Professional Services Council, American Hotel and Lodging Association, Trucking Association, contractors, et cetera, et cetera—expressed the concerns of this entire Committee, that definitely we want to make sure that bad actors in the contracting field don't remain as bad actors in the contracting field—that they are removed or they benefit from the training and the resourcing that can be given using present law that is in place, using the capabilities that ought to be there with our agencies to instruct them in very difficult—very difficult law that is in place to protect employees, the workplace, as well as the employers.

We have heard testimony that there are associations and client bases that are being trained, but that ought to come from our government level, as well. And I think that is where my concern comes with this executive order.

It is based upon the fact—and I think I would quote what the President said in his executive order, that he said that the vast majority of federal contractors play by the rules. But he also said that they would not—they would likely not be impacted by it. I disagree with that.

I agree with the fact that the vast majority of our contractors do play by the rules. And even those that sometimes find themselves in violation of rules simply because they weren't told the rule or they weren't instructed in the rule, yet want to play by the rules.

But these who are good actors and play by the rules will be impacted by this executive order. There is no way that they won't.

And so my concerns, as we take up this order, are several, and I will just sift them down into just a few.

I am concerned about the lack of due process protections under the executive order, that we will have a situation where self-reporting requirement to go back, at great risk of not knowing every single incidence that a subcontractor, for instance, might have run amuck of some rule or some policy, in many cases through no fault of their own, just not being aware of it. All of a sudden we have due process concerns that innocent—that our—these contractors are considered guilty until proven innocent. I have got a concern about that.

I have a concern about burdensome reporting requirements added on top. And if we are concerned about employees having their jobs and having the security of their jobs, if we are concerned about minority and women-owned businesses, for example, of being able to continue to contract, and yet in general, in most cases, being small entities without the ability to have vast resources of legal backup and background to ferret them through the process of

the contracting with this executive order and the great burden that that puts on, specifically in the area of making a mistake through no fault or no effort of their own, and now running amuck of this executive order and the new provisions. I have a concern with that.

But I think I also have a concern with the fact that this is an administrative order that very likely has illegal ramifications. And I stand here as—or sit here as a member of Congress, very concerned that, Democrat or Republican, that we continue to uphold the primacy of the People's House, the People's Congress, the Article 1 of our Constitution, with significant responsibilities for all of these laws that we protect the people we represent and we don't give over that authority to Article 3, the executive office, without the authority being given by the Constitution to the President.

I know that can be battled in the court of law, and I am afraid that if this executive order is implemented there will be plenty of court battles, indicating that, in fact, this administration overstepped their bounds of authority.

The unprecedented level of subjectivity introduced into the responsibility determination process of this executive order and the possible consideration of non-final adjudications establishes the executive order as an anti-competitive administration initiative that I believe will greatly impede government contracting. And that is my concern, and that is why I am glad we had this hearing today.

This isn't the end. And I can say for employer and employee alike, we want to get down to the problem to make sure that we use the present law effectively to protect all concerned, but also make sure that we don't allow impediments to come in with good intentions that will hurt all aforementioned.

So, having stated my piece right now and having heard the questions and the responses and the testimonies, with no further business to come before the subcommittee, it is adjourned.

[Additional submissions by Mr. Walberg follow:]

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JP540661 March 2, 2015

U.S. House Committee on Education & the Workforce
Subcommittees on Workforce Protections and
Health, Education, Labor & Pensions
2181 Rayburn House Office Building
Washington, D.C. 20515

Re: The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat

Dear Chairman Walberg and members of the Subcommittees:

I write to follow up on a question from Representative Clark (D-MA) during the hearing on February 26 examining the blacklisting executive order. Representative Clark suggested that there is division among the courts of appeal regarding the enforceability of pre-dispute arbitration clauses. She cited the Fifth Circuit's decision in *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009), as a purported example of a situation in which a court refused to enforce a pre-dispute arbitration clause. Now that I have had a chance to review that decision, I can say that that characterization is wrong.

The parties in *Jones* agreed that "there was a valid and enforceable agreement to arbitrate." *Id.* at 234. The only question before the Fifth Circuit was whether the conduct at issue – an alleged gang rape in employer-provided housing – fell within the scope of the arbitration clause. *Id.* The Court held that it did not. *Id.* at 242. The Fifth Circuit's holding that the claims in *Jones* were beyond the scope of the arbitration clause has no bearing on the question whether an employer can require employees to agree to pre-dispute arbitration clauses. Indeed, to the extent *Jones* speaks to this question at all, it recognizes that such agreements *are* enforceable. *See id.* at 234.[1]

There is no division among the federal courts of appeal on this issue: As explained in my written testimony (pp. 7-8), every court of appeals has recognized that, under the Federal

[1] When the case was later tried before a jury, a verdict was entered for the defendants on all claims. *See Jones v. Halliburton Co.*, No. 4:07-cv-2719, 2011 WL 4479119, at *1 (S.D. Tex. Sept. 26, 2011).

Arbitration Act ("FAA"), employers have the right to require employees to agree to pre-dispute arbitration of any future claims arising under Title VII.[2]

Congress conferred this statutory right, and the President does not have the authority to unilaterally alter or restrict it. Regardless of how one views the use of pre-dispute arbitration clauses, the only authority to affect any changes in how they are used rests with Congress. It alone is free to amend or repeal the FAA, the President is not. The FAA established this right and courts have universally upheld it. The Fair Pay and Safe Workplaces Executive Order oversteps the President's authority and usurps Congress's legislative functions.[3]

For these reasons, and those expressed in the testimony presented last week, the Subcommittees should do everything in their power to block the Administration from proceeding with this Executive Order.

Sincerely,

Willis J. Goldsmith

Willis J. Goldsmith

[2] *See EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc); *Weeks v. Harden Manufacturing Corp.*, 291 F.3d 1307, 1313-14 (11th Cir. 2002); *Desiderio v. National Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 204-06 (2d Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

[3] As I also noted in my written statement (p. 8 n.21), "Contrast the President's attempt to restrict employers' rights under the FAA with the congressionally enacted limitation under the FY 2010 Department of Defense Appropriations Act (the "Franken Amendment"). Ironically, although this amendment is clearly the inspiration for this provision of the Executive Order, rather than bolster the argument for this provision, the comparison highlights the illegitimacy of trying to do this through an executive order."

STEPHEN E. SANDHERR, Chief Executive Officer

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

March 6, 2015

The Honorable Phil Roe
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions
1433 Longworth House Office Building
Washington, DC 20515

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
2436 Rayburn House Office Building
Washington, DC 20515

RE: "The Blacklisting Executive Order: Rewriting Federal Labor Policies through Executive Fiat" Joint Hearing

Dear Chairman Roe and Chairman Walberg,

The Associated General Contractors of America (AGC) firmly supports sensible and effective means to protect the health, safety and livelihood of construction contractors' most valuable asset: their employees. Perennial bad actors who willfully and pervasively jeopardize these employer responsibilities threaten the integrity of fair and open competition, stain the construction industry's professional reputation for excellence, and, most importantly, risk lives.

While the intent of the "Fair Pay and Safe Workplaces" Executive Order 13673 (herein "EO") may be to penalize bad-actor contractors, AGC strongly opposes the EO because it will not achieve this intent. Rather, the EO will function in an unreasonable, inconsistent and ineffective manner, excluding from service to the government not only bad-actor contractors but also well-intentioned, ethical contractors. The EO needlessly creates a new, complicated and unmanageable bureaucracy to address problems for which a host of federal laws, regulations and bureaucracies already hold jurisdiction. Furthermore, the EO will lead to crippling delays in federal contracting, encourage unnecessary litigation, and increase procurement costs to the government and taxpayers.

To provide some background, AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms, including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

The process established by the EO is unnecessary. AGC members are already subject to a multitude of federal laws, regulations and executive actions governing labor and employment. These laws include a host of exclusive penalties and remedies for violations. These statutes also provide exclusive remedies for violations. However, the EO provides an additional remedy not contemplated or addressed in these statutes. In addition, the Federal Acquisition Regulation (FAR) already provides a number of avenues, like suspension or debarment, for federal agencies to deal with bad actors that willfully or repeatedly violate the law. Reporting mechanisms for violations and performance issues already exist through the Federal Awardee Performance and Integrity Information System, the Contractor Performance Assessment Reporting System, Past Performance Information Retrieval System and System for Award Management, among others. If the Administration believes that the penalties in these laws and reporting mechanisms do

not sufficiently deter violations, it should work with Congress to address this within existing laws rather than create a new bureaucratic system that will subjectively and inconsistently penalize contractors and lead to increased costs and delays in federal procurement.

The EO calls for the creation of a new labor compliance advisor (LCA) position in federal agencies to advise contracting officers (COs) in their contractor responsibility determination decisions. Under the EO, COs may deny a contractor the right to compete for a contract over $500,000 when the CO finds that a contractor's violations of 14 federal laws—and an unspecified number of "equivalent" state laws—reflect an unsatisfactory record of integrity and business ethics. As referenced above, a federal agency already has the power to suspend or debar a bad actor under the FAR. The suspension and debarment process is long established and functions on a government-wide basis. Each contracting agency already has a suspension and debarment official with expertise to make such a decision. COs, however, generally lack the legal knowledge and experience to interpret the severity of violations or the jurisprudence of different federal and state courts to make such determinations. Even if an LCA with legal experience and knowledge advises the CO, the CO ultimately is charged with making the contractor responsibility determination.

Additionally, under the EO, COs can now effectively debar a contractor on an individual contract-by-contract basis. This means that a CO can deny a contractor the right to compete on one contract based on its record of integrity and business ethics, but could find that same contractor responsible enough to compete on another. Similarly, a CO in one agency or the same agency may have a different opinion of what violations—the number and severity—constitute an unsatisfactory record of integrity or business ethics than another CO. Likewise, a LCA in one agency could have a different opinion than another LCA. A contractor may be found to have an unsatisfactory record for a contract by one CO but a satisfactory record by another CO *in the same agency*. Considering that the federal government, let alone one agency, executes thousands of contracts over $500,000 per year, such a system will be unwieldy, highly subjective and incredibly inconsistent. Also, such a situation noted above could seriously impact contractors that do non-federal, i.e., state government or private work. For example, many state and private construction agencies will not contract with a construction company that has been suspended or debarred by the federal government. How would a contractor—or agency for that matter—determine if it could bid on the contract when one CO in a federal agency has found the contractor has an unsatisfactory record while CO another in the same agency finds it to be satisfactory?

The EO adds further significant subjectivity to these determinations in its requiring the reporting of violations of "equivalent" state laws. For example, different states may have the exact same statutory language for a pay or safety law, but their courts could interpret that language differently. It is probably safe to say that a state court in California may interpret the same statutory language found in a South Carolina law differently than a South Carolina court. Accordingly, a contractor's consistent employment practices in the two states could be treated inconsistently by state courts. For example, the South Carolina court might deem a practice to be lawful, whereas the California court might deem it to be unlawful and effectively prevent the contractor from receiving or retaining a federal contract or subcontract. No CO or LCA will conceivably understand the jurisprudence of 50 state laws and how those law may differ by court decision. The result will be vast inconsistency and unfairness.

Furthermore, federal acquisition personnel are already overworked and undertrained. COs oversee construction contractor compliance with not only individual contract specifications, but also general FAR provisions mandating environmental, safety, bonding, past performance evaluation, small business participation, and performance of work requirements. The EO will further burden COs at both the pre-award and post-award stages, as prime and subcontractors must make reports before contract award and

every six months on a per-contract basis. This will add time to an already slow procurement process. Additionally, the EO mandates the creation of a new LCA position in each agency who will compete for acquisition training resources. Consequently, the EO will place a significant burden on federal coffers through procurement delay and acquisition staff training and resources.

The EO's reporting of subcontractor violations and prime contractor responsibility determinations of those subcontractors could significantly delay projects and deleteriously impact the prime/subcontractor working relationship. Subcontractors with subcontracts of $500,000 and above must report their violations every six months through the prime contractor to the CO. If a subcontractor has a violation during that period whereby a CO finds that subcontractor to have an unsatisfactory record, the CO can require the prime contractor to terminate the subcontractor. This could be incredibly problematic on a construction project. For example, take a disadvantaged, minority 8(a) small business subcontractor on an inland waterway lock project that specializes in lock mechanical work. During the project, the subcontractor is found to have violated safety laws on a separate but concurrent project. However, there is no other qualified mechanical contractor available to complete the work on the project for one year. If the subcontractor is terminated under the EO, the prime contractor must wait one year to continue work on the project, which could require complete demobilization of equipment. This will cost time, money and, if we are talking about a major waterway, possible delays of millions of tons of cargo traveling on barges up and down the river. Furthermore, the fact that this 8(a) small business subcontractor is terminated could now jeopardize the prime contractor's small business goals by no fault of the prime contractor. This would negatively impact the prime contractor's past performance review, which it needs to attain new work. Additionally, the EO establishes a precarious relationship between prime and subcontractors. As with the COs, the prime contractor determination of a subcontractor's record will be subjective and could vary from region to region, and office to office. Furthermore, the EO places the prime contractor at risk of violating the False Claims Act in the event a subcontractor misrepresents its violations in any report to the prime contractors therein reported to the CO.

Lastly, the EO will encourage litigation in at least two respects. First, contractors would fully litigate alleged violations. As noted, the EO establishes a bureaucratic system with a wide degree of individual subjectivity and apparently little due process protection. Operating in such a reality, contractors will seek to fully litigate (rather than settle) many more alleged violations to protect their business from an uncertain "blacklisting" determination. Second, contractors found to have unsatisfactory records are likely to appeal that decision. Such outcomes will increase the caseloads on court dockets, delay adjudications, and further strain judicial resources.

Again, AGC strongly opposes this EO. It is unnecessary and will function in an unreasonable, inconsistent and ineffective manner, excluding from service to the government not only bad-actor contractors but also well-intentioned, ethical contractors. Consequently, AGC looks forward to working with you and other members of Congress to curtail implementation of this EO.

Sincerely,

Stephen E. Sandherr
Chief Executive Officer

[Additional submission by Ms. Walter follows:]

INTEGRITY
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To Whom It May Concern:

As a contractor that has done business with the Federal Government, it is important to me to be able to compete on quality and efficiency while still providing fair wages and benefits to my employees. .

Reviewing a company's track record of compliance with workplace laws and encouraging those that are not in compliance to make adjustments is a sensible contracting policy for governments to adopt. Doing so benefits both taxpayers and law-abiding businesses by helping ensure that there is a fair competition for government contracts.

We have found that the policies impose only a minimal burden on our business and that without such policies, the contracting process can resemble a race to the bottom. Unfortunately, when we compete for federal contracts, too often our competitors do not abide by workplace laws.

We are proud to provide a good value to taxpayers while also treating our employees with respect. Responsible contractor policies help us achieve these goals. We support policies to help ensure that companies contracting with the government comply with workplace laws and would support governments at the local, state and federal level to adopt similar policies.

Sincerely,

Antoninus Hines

July 18, 2014

To Whom It May Concern:

Our experience with responsible contractor policies in the District of Columbia has been positive.

Reviewing a company's track record of compliance with workplace laws and encouraging those that are not in compliance to make adjustments, is a sensible contracting policy for governments to adopt. Doing so benefits both taxpayers and law-abiding businesses by helping ensure that there is a fair competition for government contracts.

Too often, we are forced to compete against companies that lower costs by short-changing their workers out of wages that are legally owed to them. The District of Columbia's contractor responsibility requirements haven't made the contracting review process too burdensome. And now we are more likely to bid on contracts because we know that we are not at a competitive disadvantage against law-breaking companies.

We support policies to help ensure that companies contracting with the government comply with workplace laws and would support governments at the local, state and federal level to adopt similar policies.

Sincerely,

Allen G. Sander
Chief Operating Officer
Olympus Building Services, Inc.

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Total Quality

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May 5, 2014

To Whom it May Concern:

As a contractor that has done business with the Federal Government, it is important to me to be able to compete on quality and efficiency while still providing fair wages and benefits to my employees. The playing field is not level when I find myself competing with vendors that routinely cut corners on wages and benefits. I believe open and fair competition will be strengthened by careful examination of prospective vendors' track records.

Please do not hesitate to call me with any questions you may have.

Sincerely,

Victor Moran
President, CEO

[Questions submitted for the record:]

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

March 27, 2015

Ms. Karla Walter
Associate Director of the American Worker Project
Center for American Progress
1333 H Street, N.W.
Washington, D.C. 20005

Dear Ms. Walter:

Thank you for testifying at the February 26, 2015 Subcommittee on Workforce Protections and Subcommittee on Health, Employment, Labor, and Pension joint hearing entitled "The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat." I appreciate your participation.

Enclosed are additional questions submitted by Subcommittee members following the hearing. Please provide written responses no later than April 13, 2015, for inclusion in the official hearing record. Responses should be sent to Alexa Turner of the Committee staff, who can be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the Subcommittees.

Sincerely,

Tim Walberg
Chairman
Subcommittee on Workforce Protections

Questions for the Record
"The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat"
Subcommittee on Workforce Protections
Subcommittee on Health, Employment Labor, and Pensions
February 26, 2015

Questions from Ranking Member Frederica Wilson (FL-24)

1. At the hearing, you cited a Senate HELP Committee report which included a listing of top contractors that were tied to instances in which back wages were owed to their employees due to wage and hour violations. Another witness at the hearing challenged that report testifying that "What the report failed to highlight is that, in nearly half of the top 15 cases listed in the report, the contractor was not at fault for the violations. Many contract-related cases involving back pay occur because the contracting agency, i.e. the government, failed to include required Service Contract Act or Davis-Bacon Act clauses or correct wage determinations into the contract."

   a.) Is this a fair characterization of the data in this Senate HELP Committee report? How did the report address issue?

   b.) As a matter of policy, should contractors be deemed "not responsible" if the government failed to include the correct wage determinations in the contract?

   c.) How will the Executive Order treat this kind of circumstance involving wage and hour violations?

[Response to questions submitted for the record:]

Center for American Progress Action Fund

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Questions for the Record for Karla Walter, Center for American Progress Action Fund

1. *At the hearing you cited a Senate HELP Committee report which included a listing of top contractors that were tied to instances in which back wages were owed to their employees due to wage and hour violations. Another witness at the hearing challenged the report testifying that "What the report failed to highlight is that, in nearly half of the top 15 cases listed in the report, the contractor was not at fault for the violations. Many contract-related cases involving back pay occur because the contracting agency, i.e. the government, failed to include required Service Contract Act or Davis-Bacon Act clauses or correct wage determinations into the contract."*

    a. *Is this a fair characterization of the data in this Senate HELP Committee report? How did the report address this issue?*

    The 2013 Senate HELP Committee report reviewed the 100 largest assessments for violations of workplace wage laws and the 100 largest penalties for violations of health and safety laws between fiscal years 2007 and 2012, finding that nearly 30 percent of the top violations were committed by companies that received government contracts after having committed these violations.[1]

    Mr. Soloway claimed that this report "failed to highlight" cases where the back pay violations were due to contracting agency error—that is, when an agency failed to insert prevailing wage requirements in a contract or provided inaccurate guidance on wage requirements. In fact, the report addressed this issue in both the body of the text and in a report appendix—identifying 8 violations that were due to these errors out of a total universe of 58 violations.[2]

    Eliminating all 8 cases from the report's top line statistics, as Mr. Soloway presumably suggests, yields similar results: the total percentage of the top violations committed by companies that continued to receive contracts drops from 30 percent to 25 percent.[3] Even this more conservative methodology validates the report's central thesis: government contractors are too often among the worst violators of workplace laws.

b. As a matter of policy, should contractors be deemed "not responsible" if the government failed to include the correct wage determinations in the contract?

Private companies should not be held responsible for wage determination errors by the federal government. Current federal regulations state that "[c]ontracting agencies are responsible for insuring that only the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and for designating specifically the work to which such wage determinations will apply."[4] There is nothing in the Fair Pay and Safe Workplaces Executive Order that would indicate that this policy will change.

c. How will the Executive Order treat this kind of circumstance involving wage and hour violations?

The executive order aims to create a fair and consistent process by which the federal government can help ensure all federal contractors are responsible and respect their workers—specifically targeting only companies with "serious, repeated, willful, or pervasive" violations.[5]

While the administration's draft language defining what constitutes these types of violations is not yet public, nothing in the order indicates that back wage assessments due to government error would be included in these categories.

Moreover, the regulations will establish a process for contracting officers to consult with Labor Compliance Advisors and the Department of Labor to ensure that they interpret a company's record correctly.

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[1] Majority Committee Staff of the Senate Health, Education, Labor, and Pensions Committee, "Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk," December 2013, available at: http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf.

[2] Ibid. See Table C on page 15 of the report, which identifies the 8 companies with these sorts of problems, as well as Report Appendix IV: Company Profiles which provides details on each of these cases. Note that the report documents OSHA violations at 6 of the 8 companies identified. Appendix available at https://cdn.americanprogressaction.org/wp-content/uploads/2015/02/SenateHELPCommittee-Appendix.pdf.

[3] Eliminating these 8 violations would reduce to total number of violations that were committed by companies that received government contracts after having committed them from 58 to 50.

[4] *Code of Federal Regulations,* title 29, sec. 1.6, "Use and effectiveness of wage determinations," available at http://www.gpo.gov/fdsys/pkg/CFR-2014-title29-vol1/xml/CFR-2014-title29-vol1-sec1-6.xml.

[5] Executive Order no. 13673, "Fair Pay and Safe Workplaces," July 31, 2014, available at https://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces.

[Whereupon, at 12:15 p.m., the subcommittees were adjourned.]

○